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No. 79-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ROGER DOLESE AND THE DOLESE COMPANY, INDIVIDUALLY AND AS TRANSFEREES OF DOLESE BROS. CO., A DISSOLVED CORPORATION, AND DOLESE CONCRETE COMPANY, A WHOLLY OWNED SUBSIDIARY OF THE DOLESE COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Roger Dolese, The Dolese Company and Dolese Concrete Company, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on August 20, 1979, rehearing denied October 4, 1979.

OPINIONS BELOW

Two separate and unreported awards of summary judgment have been entered by the District Court in this action. The first judgment was entered on April 29, 1975; the second, on March 25, 1977. Both judgments together with excerpts from the transcripts of hearings held on April 29, 1975 and on March 8, 1977, respectively, in which the District Judge explains his rationale for each decision are printed in the Appendix to this petition.[1]

The opinion of the Court of Appeals reversing and remanding the first entry of summary judgment on procedural grounds is reported at 541 F. 2d 853 (1976) and printed in the Appendix to this Petition.

The opinion of the Court of Appeals affirming the second entry of summary judgment is not yet reported. That opinion is printed in the Appendix to this Petition. The order denying rehearing is likewise printed in the Appendix.

The *Opinion* Of [the state] Trial Court with *Findings* and *Conclusions* and *Journal Entry of Judgment* in the antecedent action of *Ardith Carlene Gossi Dolese* v. *Roger Meroth Dolese, The Dolese Company, Inc., Dolese Bros. Co., Inc. and Dolese Concrete Company, Inc.* (No. 102,499-D, District Court of Oklahoma County, 12/19/68) (hereafter referred to as *Dolese* v. *Dolese et al.*) is lengthy. It is contained in full at pp. 102-108 of Appendix V of the record below which

[1] The complete transcripts of each hearing are contained in Appendices IV and XIII, respectively, of the record below which have been requested to be certified and lodged with this Court pursuant to Rule 21(1) of the Rules of the Supreme Court of the United States.

has been requested to be certified and lodged with this Court in accordance with Rule 21(1) of the Rules of the Supreme Court of the United States.[2] The Affidavit of the state court Judge Geo. Howard Wilson explaining those of his decisions in that action which are relevant to this proceeding is printed in the Appendix to this Petition; the Exhibits referred to therein appear at Rec. App. V, pp. 8-237.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1979. Rehearing was denied on October 4, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291; the District Court, pursuant to 28 U.S.C. § 1346(a)(1).

QUESTIONS PRESENTED

(1) Whether this Court should exercise its duty of supervision over the lower courts (a) to determine that summary judgment herein was improper and that petitioners have offered substantial uncontroverted evidence on the basis of which a trier of fact could decide in favor of petitioners and (b) to direct that petitioners be granted a full evidentiary trial on these issues.

(2) Whether this Court should resolve the direct conflict between the decision of the Tenth Circuit in

[2] The portions of the record below which are included in the request for certification and transmission to this Court will be referred to hereafter in this Petition as "Rec. App." The printed Appendix attached to this Petition will be referred to hereafter as "App.".

this case and decisions of the Fifth and Eighth Circuits, the Tenth Circuit having held that constructive dividends to a shareholder can result from payment of a corporation's own binding legal obligation and the Fifth and Eighth Circuits having previously held to the contrary.

STATUTES INVOLVED

The statutory provisions involved are Rule 56 of the Federal Rules of Civil Procedure; sections 162(a), 301 and 316(a) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 162(a), 301 and 316(a); and sections 231 and 930 of Title 12 of the Oklahoma Statutes. They are printed in the Statutory Appendix to this Petition.

STATEMENT OF THE CASE

This petition questions the propriety of an award of summary judgment in favor of the United States in three consolidated actions for refund of Federal income tax and interest in the total amount of $1,533,755.38. After having complied with the jurisdictional prerequisites, petitioners timely filed these suits for refund on June 28, 1974 in Federal District Court in the Western District of Oklahoma pursuant to 28 U.S.C. Section 1346(a)(1). Trial of 30 contentions of fact and 18 mixed issues of fact and law was set for April 29, 1975 pursuant to a lengthy pretrial order,[3] and petitioners and their witnesses were present in Court on that date. Thereupon District Judge Stephen Chandler granted the defendant United States' motion for summary judgment so as to "get [the parties] on their way to the Court of Appeals so you can cheaply

[3] The Pretrial Order is set forth in full at Rec. App. I, pp. 216-278.

find out what the law is". Transcript I, App. p. 7a. Upon remand by the Tenth Circuit on the procedural ground that no adequate notice had been given to petitioners, 541 F.2d 853 (1976), App. p. 20a, Judge Chandler reentered the summary judgment on March 25, 1977 so that the Tenth Circuit "would then [consider] the matter on the merits as to whether or not there [is] any material fact in dispute and whether it was that summary judgment should have been entered if the law was as I thought". Transcript II, Rec. App. XIII, p. 8.

Three issues were raised below—deductibility of corporate payments of litigation expense; chargeability of those same payments to the sole shareholder as constructive dividends; and the status as loans or dividends of withdrawals from the corporations by the shareholder. As to each issue, the trial judge found no material factual issues to be tried.

The first two issues result from the entry of judgment in a nine year litigation, *Dolese* v. *Dolese et al.*, wherein the plaintiff, petitioner Roger Dolese's alleged wife, Ardith Dolese, joined each of the corporations as a separate defendant, obtained a court order restraining the corporations from entering into any transactions outside the normal course of business, and, finally, sought to have herself "placed in the control and management of the companies under the order and direction of the [state] court," which the state judge considered "tantamount to a receivership."[4] Rec. App. V, pp. 56, 61. Accordingly, the corporations were forced to participate actively in the litigation, preparing responsive pleadings, seeking clarification of the restraining order and obtaining permission from the state court to

[4] Affidavit of Judge Geo. Howard Wilson, ¶ 7, App. p. 48a.

make or liquidate investments, purchase equipment, construct plant and improvements, settle a lawsuit, etc. Rec. App. V, pp. 13-81. After taking the deposition of Ardith Dolese and of Roger Dolese, the state court judge determined that the action of *Dolese* v. *Dolese et al.* "included a conspiracy to take over control of the three Dolese companies . . . [and] that the Dolese companies were deeply involved and were fighting for their corporate lives". Affidavit of Judge Geo. Howard Wilson, ¶ 9, App. p. 49a. Therefore, pursuant to Oklahoma Law (Okla. Stat. tit. 12, § 930), Judge Wilson, *sua sponte,* apportioned the litigation costs, including those previously paid by Roger Dolese individually, among Roger and each of the three corporate defendants. *See, Opinion* of Trial Court with *Findings* and *Conclusions* and *Journal Entry of Judgment* (12/9/68) p. 103; Rec. App. V, p. 204. Each corporation paid its pro rata share of these costs as provided in the state court judgment and deducted them from gross income for Federal income tax purposes as ordinary and necessary business expenses. The Internal Revenue Service disallowed this deduction and charged the payments as taxable dividend income to Roger Dolese in conflict with the tax law as construed by the Fifth and Eighth Circuits.

The third issue concerns the status as loans or dividends of withdrawals from The Dolese Company by Roger Dolese. Since 1946, Roger Dolese has maintained a running account with the corporation. Originally, the account reflected monies lent by Roger to the corporation. In later years, it reflected withdrawals by Roger from the corporation; however, payments totalling in excess of $2.2 million have been made by Roger to The Dolese Company on this account

during the period 1949 to 1974.[5] Rec. App. V, p. 299. These amounts have consistently been treated as loans on the corporate books, audited financial statements and tax returns (entailing liability for state intangible and franchise taxes) and on Roger Dolese's individual financial statements and tax returns, and the Internal Revenue Service had acquiesced in such treatment.[6] Affidavit of W. Bryan Arnn, Rec. App. V, pp. 288-296. Beginning in 1966, notes for these amounts were signed and annually renewed, and interest of four percent was paid on the total balance. *Id.* As soon as the action of *Dolese* v. *Dolese et al.* and the restraining order incident thereto were terminated in January of 1969, Roger Dolese promptly liquidated Dolese Bros. Co. at a total tax cost of approximately $1,750,000, for the sole purpose of paying this indebtedness. *Id.* Roger Dolese always had personal assets and credit sufficient to repay all advances, and as a result of the liquidation of Dolese Bros. Co., Roger obtained the ready cash to repay the balance owing on his account. Affidavit of Morrison G. Tucker ¶ 9, p.3; Rec. App. V, p. 325. Nevertheless, the Internal Revenue Service has now asserted that these withdrawals constitute dividends to Roger Dolese, which has prevented the repayment of this account as planned.

As to all these issues, these petitioners and the defendant United States were unable even to agree on the

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[5] From 1953 to 1967 during the pendency of the state court litigation, the corporations were instructed by that court to make advances to Roger Dolese to pay amounts totaling $1,184,461.82 which it ordered him personally to pay. Rec. App. V, p. 76. Thus, these advances were not used for personal living or pleasure by Roger Dolese.

[6] A closing agreement to that effect was signed by the Internal Revenue Service on February 20, 1968. Rec. App. V, pp. 300-303.

disputed facts (and submitted a total of 30 contentions of fact to be tried) and were unable to agree on the disputed legal issues (and submitted a total of 18 mixed issues to be resolved). Rec. App. I, pp. 218-229. These contentions and issues were material and, in opposition to entry of summary judgment, petitioners placed an offer of proof in the record containing substantial uncontroverted evidence in their favor.

REASONS FOR GRANTING THE WRIT

1. These Petitioners Have Been Denied A Full And Fair Trial In Violation Of The Fifth Amendment To The Constitution Of The United States.

The noted Judge Stephen S. Chandler has twice denied these petitioners a fair trial on substantial factual questions by entering summary judgment for the defendant United States. On April 29, 1975, the Honorable Judge Chandler explained his first order:

> *"It seems to me it's best for all the parties to sustain the Government's Motion for Summary Judgment and get you on your way to the Court of Appeals so you can cheaply find out what the law is;* if they send it back here to me, then I'll try it the best I know how or get you a good judge, but I think we have to find out regardless, *without having reams of paper in the record and making the Court Reporter rich,* find out what their feeling is about this . . . .
>
> "I have no pride or feeling about that, but it's just I've learned from sitting here 32 years, the 13th day of May, that they are the ones that make the law, and my duty has just about resolved itself into, *as a District Judge, a glorified trial examiner, and the thing to do is find out first from them before wasting all this time and money making a full record* . . . .

> "While you look pretty grim right now, you may decide you have a better chance in the Court of Appeals, with the action posed like it is, than if you had prevailed here. *You certainly have an equally good opportunity to have the law laid down as you contend*——" (emphasis supplied).
>
> Transcript I, pp. 14-15, App. pp. 7a-8a.

This summary judgment was entered without adequate notice to petitioners and without adequate opportunity to respond. Petitioners had appeared with their witnesses, were prepared for trial in accordance with the pretrial order and were surprised by Judge Chandler's decision. On appeal, the Tenth Circuit reversed and remanded this first order for failure of notice. 541 F.2d 853 (1976). App. p. 20a.

At a hearing on March 8, 1977, after the remand, Judge Chandler revealed that he had not reconsidered his previous decision that granting summary judgment was "the way to find out what the law is and the quickest way,"[1] Transcript II, App. p. 18a, and that in his opinion the effect of his summary decision would be complete, *de novo* review by the Tenth Circuit:

> "I read your [Counsel for the United States] brief that the entire matter depended on whether or not—if the ten days had expired and they had had ten days to answer the motion for summary [sic], *the Court would then have considered the matter on the merits as to whether or not there was any material fact in dispute and whether it was that summary judgment should have been en-*

[1] It should be noted that petitioners' affidavits were introduced at the first opportunity, but after the first award of summary judgment, and thus were not considered by Judge Chandler in reaching this decision.

ally streamlining his own docket.* However, contrary to Judge Chandler's "experience", a District Judge is not merely a trial examiner; his decisions are accorded weight, in this case weight prejudicial to the rights of these petitioners. Judge Chandler either

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to act for lack of jurisdiction), the Tenth Circuit Judicial Council found that:

> "Judge Chandler is presently unable, or unwilling to discharge efficiently the duties of his office . . . and that the effective and expeditious administration of the business of the United States District Court for the Western District of Oklahoma requires the orders herein made."
>
> *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970) at pp. 77-78

The basis for the Judicial Council's order was apparently statistics compiled in an official report prepared by Orin Thiel of the Administrative Office of U.S. Courts, "The Judicial Business of the U.S. District Court for the Western District of Oklahoma" (December, 1963), which disclosed in part that Judge Chandler had held court for a total of only 17 days during a 12-month period when he had accumulated a total of only 58 hours 45 minutes conducting trials and pretrials of which 10 hours was devoted to (one) jury trial. *See* "Chandler Report: 17 Court Days in Year," *The Daily Oklahoman*, (January 6, 1966), App. p. 52a. *See also*, Joseph C. Goulden, *The Benchwarmers* (New York 1974), Chapter Five "When the System Flops II: The Tiger Who Drinks Wild Turkey" at pp. 238-9, citing a 1965 letter to Judge Chandler from his colleague, Federal District Judge Luther Bohanon:

> "It is my sincere conviction that the litigants and the lawyers of this court should have better treatment than they have been getting in the cases assigned to you, in that you do not give them an opportunity to try their cases."

This court has access to the statistics in the Administrative Office, not publicly available, detailing, for the docket of each Federal Judge, which matters actually come to trial on the merits and which are disposed of summarily. Thus, it may be possible for this Court to verify Judge Bohanon's conviction that litigants before Judge Chandler do not get the opportunity to try their cases.

ignores or overlooks two major sources of such prejudice: first, that review by the Court of Appeals on an expedited record is not a fair hearing of these petitioners' case when all of their evidence is not part of that record; second, that these petitioners do not have "an equally good opportunity to have the law laid down as [they] contend" once summary judgment has been granted in favor of the United States.

It is not clear from the opinion below exactly what standard of review was applied by the Tenth Circuit:

> "In resolving the questions on appeal we must keep in mind that summary judgment was granted by the trial court."
>
> App. p.29a

Although that Court has held in *Colorado Springs National Bank* v. *United States,* 505 F.2d 1185 (1974) at p. 1189, that the clearly erroneous standard does not apply on appellate review of the application of federal tax law to a factual record, other cases have held that, even where evidence is wholly documentary, the lower court's view of the facts will be overruled only upon "a definite and firm conviction that a mistake has been made." *Martinez* v. *Turner,* 461 F.2d 261 (10th Cir. 1972), *Sta-rite Industries* v. *Johnson,* 453 F.2d 1192 (10th Cir. 1971). In any event, it cannot be doubted that a District Judge's award of summary judgment would not be lightly overturned. This fact demonstrates at the very least a shift in the burden of proof detrimental to these petitioners' due process rights.[10]

[10] The moving party in a motion for summary judgment must show that there is no genuine issue as to any material fact. Rule 56(c), Federal Rules of Civil Procedure; *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464 (1964). As detailed below, there were substantial factual issues to be tried in this case.

In the wake of its unsuccessful efforts to curtail Judge Chandler's authority, the Tenth Circuit is apparently resigned to according him the full measure of deference due a District Judge, despite their perception of his behavior as irresponsible. *See, Chandler* v. *Judicial Council of the Tenth Circuit,* 398 U.S. 74 (1970). However, while it may now be established that the Tenth Circuit and its Judicial Council may not deprive Judge Chandler of the functions of his office, that does not justify a failure to supervise his conduct of this case. The Tenth Circuit has "so far sanctioned such a departure [from the accepted and usual course of judicial proceedings] by a lower court, as to call for an exercise of this court's power of supervision." Rule 19(1)(b), Rules of the Supreme Court of the United States. This case appears to be the last case ever to be assigned to Judge Chandler. Thus, it might appear advantageous to let him retire quietly—to all except these petitioners.

These petitioners like all others have a right to a fair trial in the District Court. That right is not vindicated on an inadequate record by a later and abbreviated appellate procedure wherein the *petitioners* are the moving parties bearing an additional burden of proof. The right to a full hearing on the merits is too highly valued and too important to our judicial system to be given such short shrift.

2. The Court Below Has Flagrantly Transgressed The Limits Of The Summary Judgment Power In Direct Conflict With The Standards Set By This Court In *Poller* v. *Columbia Broadcasting System et al.*, 368 U.S. 464 (1962).

On April 25, 1975, four days before he first entered summary judgment in favor of the United States, Judge Chandler issued a pretrial order which set forth thirty "contentions of fact to be litigated" and eighteen "contentions of issues of law (and mixed issues of fact and law) to be litigated." Rec. App. I, pp. 216-278. Significantly, the plaintiffs (petitioners) and the defendant (United States) could not even agree on a joint list of such contentions; thus, their enumerations appear separately. Under the heading "facts, [which] though not admitted, are not to be contested at trial," the order lists, "None." Six of the seven witnesses on the defendant's list also appeared on the list (of nine) submitted by plaintiffs, indicating that counsel for the United States believed that these witnesses could furnish additional information not yet contained in the record. Plaintiffs listed 106 exhibits; defendant, 79. Trial was expected to last four days.

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)."
>
> *Poller, supra*, p. 467.

How, on such disparate versions of the facts as were presented here, can the "truth" be clear without an evidentiary hearing?

The record on which Judge Chandler based his decision contained depositions taken by the defendant of five of plaintiffs' intended witnesses, including plaintiff Roger Dolese. Since plaintiffs expected these witnesses to appear at trial, plaintiffs' lawyers posed no questions at the depositions to develop the merits of their case. Transcript I, Rec. App. IV, p. 19. After the surprise entry of summary judgment, when plaintiffs were permitted to place their order of proof in the record, the offer included affidavits outlining the direct testimony which these witnesses would have offered on plaintiffs' behalf. *See,* Rec. App. V. However, by the time plaintiffs were permitted to make such offer of proof, judgment had been entered, and it was too late ever to influence Judge Chandler's decision in this case. *See, supra,* p. 9. Thus, these petitioners have been denied any effective right of witness examination which is so fundamental to a fair hearing as to apply even on a summary judgment motion. *See, Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 176 (1970) (concurring Opinion of Justice Black); *Radio City Music Hall* v. *United States*, 135 F.2d 715 (2d Cir. 1943).

There are three issues in this case: (1) deductibility of expenditures by the corporate petitioners; (2) constructive dividends to the stockholder of these corporate expenditures; and (3) corporate advances to the stockholder as loans or dividends. As to the first

issue, petitioners' affidavits assert the existence of a conspiracy by Roger Dolese's alleged wife, her paramour and her brother to gain control of the Dolese corporations.[11] The existence of such a conspiracy is highly relevant to and probably determinative of both the first and second issues. Petitioners' affidavits with respect to the third issue assert the constant intention of Roger Dolese to repay all advances he had received from the corporate petitioners.[12] The evidence of such intention is highly relevant to and probably determinative of the third issue. Both conspiracy and intent are issues as to which summary judgment has been found particularly inappropriate. *See, Consolidated Electric Co.* v. *United States,* 355 F.2d 437 (9th Cir. 1966) (state of mind); *Adickes, supra; Poller, supra* (conspiracy). Even where the ultimate issues are questions of law, if the application of the law is dependent on the facts, summary judgment is inappropriate. *R. J. Reynolds Tobacco Co.* v. *Hudson,* 314 F.2d 776 (5th Cir. 1963).

Moreover, where credibility is determinative of a factual issue, summary judgment must be denied. *Cross* v. *United States,* 336 F.2d 431 (2d Cir. 1964); *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620 (1944). In this case, the determination of whether certain corporate advances are loans or dividends depends solely on the shareholder, petitioner Roger Dolese's,

[11] *See,* Affidavit of Judge Geo. Howard Wilson, ¶ 9, App. p. 49a; Affidavit of Roger Dolese, ¶¶ 6-7 pp 3-4; Rec. App. V, pp. 240-241; Affidavit of James A. Peabody ¶ 9, pp. 3-4; Rec. App. V, pp. 285-286.

[12] *See,* Affidavit of Roger Dolese, ¶ 11, p. 6; Rec. App. V, p. 243; Affidavit of John M. McPherren, ¶ 15, p. 7; Rec. App. V, p. 282; Affidavit of W. Bryan Arnn, ¶ 16, p. 8; Rec. App. V, p. 295.

intent.[13] Roger Dolese has asserted his constant intention to repay all withdrawals. Affidavit of Roger Dolese ¶ 11, p. 6; Rec. App. V, p. 243. Appraising the testimony in the related State Court litigation, *Dolese* v. *Dolese et al.,* the state court judge found Roger Dolese, "open, fair and unevasive . . . even to the point where he was knowingly hurting his own side of the case," and the judge "was impressed and believes that Roger Dolese was and did attempt to seek the truth." *Opinion* of Trial Court with *Findings* and *Conclusions* and *Journal Entry of Judgment* (12/19/68) at p. 49; Rec. App. V, p. 150. Had a jury likewise believed this petitioner, the third issue would necessarily have been resolved in petitioners' favor.

> "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"
>
> *Poller, supra,* at p. 473.

The allegations contained in petitioners' affidavits must be accepted as true for purposes of the summary judgment motion when, as here, there are no contrary

[13] In its order denying rehearing, the Tenth Circuit stated:

> "On the issue of loans versus dividends, intent to repay and expectation of repayment are significant factors not susceptible of proof by direct, objective evidence."
>
> App. p. 42a.

Where an allegation cannot be proven by objective evidence, affidavits "made on personal knowledge" by a competent witness whose testimony would be admissible may be used to show "that there is a genuine issue for trial." Rule 56, Federal Rules of Civil Procedure; *Hahn* v. *Sargent,* 523 F.2d 461, 466 (1st Cir. 1975), *cert. denied,* 425 U.S. 904 (1976).

facts in the record. Taken as accepted, they support petitioners' contentions that the corporate litigation expense payments are proper business deductions, that there are no constructive dividends and that Roger Dolese's withdrawals constitute loans. An award of summary judgment on these issues necessitated the "choice of inferences" [14] unanimously prohibited by this Court:

> "In any event both findings represent a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below. *On summary judgments the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.* A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of *International Shoe Co.* v. *Federal Trade Comm'n*, [280 U.S. 291 (1930)] it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment. Fed. Rules Civ. Proc., 56(c)." (emphasis supplied.)
>
> *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).

[14] "I think you have a strong case, but I have to decide it that way because I know—it's hard for lawyers who have never sat in the hot seat and had to decide a case, and I think I understand all the facts here and *it's just a feeling that you get what you must do*, no matter how unpleasant, and when you know the difference between an experienced lawyer and inexperienced, *intuitively* you feel certain things about what the law is, what it ought to be, and I'm not here trying to say what the law ought to be. I frankly say, I don't know what it ought to be. But, under these facts as I pull them out of the files, I think these are personal expenses, and the thing, the only thing in it that bothers me, really, is the effect of that State Court judgment, and we eliminated any contention at pretrial that there was any collusion . . .."
(emphasis supplied)

Judge Chandler,
Transcript I, App. p. 11a.

a) *Deductibility of Corporate Payment of Litigation Costs.* In the antecedent state court proceedings, the state judge had allocated litigation expenses among Roger Dolese individually and the several corporate parties. Rec. App. V, p. 103. Judge Chandler's summary order effectively held that the corporate expenditures were not deductable for Federal income tax purposes because they were not corporate liabilities despite the state court determination. The Tenth Circuit has disagreed and remanded this issue for a determination of those costs which have their origin "in the profit-making activities of the corporation" under the guidelines set forth in its opinion.[15] App. p. 32a. Further, the Tenth Circuit has acknowledged that "courts have allowed corporations to deduct the costs of resisting actions that may be detrimental to or interfere in their business activities." App. p. 33a. *See, Commissioner* v. *Henninger,* 320 U.S. 467 (1943). However, these petitioners submitted uncontroverted evidence by affidavit that the entire action of *Dolese* v. *Dolese et al.* was a step in a greater, antecedent conspiracy of Ardith Dolese with her paramour, Glenn Elston and her brother (both of whom Ardith had previously insinuated into the corporate management) to wrest control of the Dolese corporations from Roger Dolese and that the substantial investigation expense first alerted the corporations to the danger confronting them by documenting the extent of the conspiracy, and later enabled them

[15] This very remand indicates the presence of unresolved questions of fact.

to prevail in court."[16] Further, it was upon hearing evidence of this conspiracy that Judge Wilson determined that the Dolese corporations "were deeply involved and were fighting for their corporate lives," and thus that each should bear its pro rata share of the costs of that struggle.

> "I came to the decision regarding the splitting of costs after having taken the deposition of Ardith Carlene Gossi Dolese and part of the deposition of Roger Meroth Dolese. *This decision on my part was based on my determination that this action* [*Dolese* v. *Dolese et al.*] *was not just a divorce action but that it included a conspiracy to take over control of the three Dolese companies.* I was of the opinion, based on the evidence presented, that the Dolese companies were deeply involved and were fighting for their corporate lives. The Dolese companies were involuntary defendants in the action, their operations had been placed under restrictions which hampered their business, their employees had been harassed, and in my opinion their business reputation was suffering. I came to this decision to require the four defendants (in the case of Dolese v. Dolese et al.) to share equally in the payment of the costs and expenses above referred to on my own volition, without prior consultation with any party. In my opinion, the Oklahoma law (12 St. Ann. #930 and the decisions of the Oklahoma Supreme Court applicable thereto) authorized me to award and tax costs and apportion the same between the parties litigant as in my discretion I deemed right and equitable. Based on my knowledge of the facts, in my opinion the four way split of the fees and costs was right and equitable." (emphasis supplied)
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> Affidavit of Judge Geo. Howard Wilson, ¶ 9, App. pp. 50a-51a.

[16] *See*, Affidavit of James A. Peabody ¶ 8, pp. 3-4; Rec. App. V, pp. 285-286.

Such overriding conspiracy, if proven, would support deductibility by each corporation of its pro rata share of all costs under the Tenth Circuit's own analysis.

Yet, although the petitioners introduced the uncontradicted affidavits of several potential witnesses, including Judge Wilson, attesting to the existence of such a scheme, and although they were prepared to introduce the very evidence which had persuaded Judge Wilson that expenses arising from the action of *Dolese* v. *Dolese et al.* were, in the words of the Tenth Circuit, "costs of resisting actions that may be detrimental to or interfere in [the Dolese corporations'] business activities," Judge Chandler granted summary judgment and the Tenth Circuit affirmed implying that there was "no genuine issue as to any material fact." In *Poller* v. *Columbia Broadcasting System et al., supra,* the plaintiff alleged, and the defendants' affidavits did not disprove, a conspiracy under the antitrust laws. Judging that evidence, this Court stated:

> "It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that 'it is quite clear what the truth is.' Certainly there is no conclusive evidence supporting the respondents' theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.
>
> 368 U.S. at 472-3

Additionally, the state court in *Dolese* v. *Dolese et al.* was actively involved in "many phases of the

operations of the Dolese companies" which had come under the jurisdiction of the Court,[17] ("tantamount to a receivership action,")[18] by order of December 3, 1959, restraining them from "selling, transferring, conveying, assigning or otherwise disposing of, and from concealing or removing and from mortgaging, hypothecating or otherwise encumbering" any assets. Rec. App. V, p. 23. Six days later, on December 9, 1959, the corporations appeared requesting modication of the order to permit sales of surplus land, dispositions of obsolete equipment and acquisitions of new equipment "to serve present customers or maintain the overall efficiency of their operations," and to permit land acquisitions, construction of additional plants and improvements "to maintain their competitive position in the markets in which they serve." Rec. App. V, pp. 30, 32. The order was modified periodically—*e.g.* on December 21, 1959, on March 8, 1960, and on February 14, 1962 (to permit settlement of an unrelated derivative suit)—as the court became the final arbiter of many of these corporations' normal business transactions. Rec. App. V, pp. 35-81.

During this state court proceeding, attorneys for the petitioners necessarily became involved in corporate management, acting as go-betweens in periods when Roger could not be present and participate directly.

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[17] These corporations were named defendants in the action *Dolese* v. *Dolese et al.* involuntarily. Thereafter, throughout the litigation, each filed separate papers, attempted to extricate itself by demurrer, prepared responsive pleadings, sought clarification of the court order and sought permission to make or liquidate investments, transact certain business, etc. *See*, Rec. App. V, pp. 13-81.

[18] *See*, Affidavit of Judge Geo. Howard Wilson, ¶ 10, App. p. 50a and ¶ 7, App. p. 48a.

Finally upon completion of the state court case, one such attorney was placed on general retainer by the corporations. Affidavit of John M. McPherren, ¶ 11, p. 5; Rec. App. V, p. 280. Nevertheless, the corporation has been denied a deduction for this expense. Clearly, a portion of both investigative and legal expenses properly concerned only the corporations, their management and their internal business affairs. This was by no means even predominantly a typical divorce action; the uniqueness of the corporate involvement is confirmed by the affidavit of Judge Wilson:

> "In my judicial career I have tried over 10,000 divorce cases and the case of Dolese v. Dolese et al. *is the only such case involving corporate defendants as more than nominal defendants.* Here, the very existence of the Dolese companies was at stake for which they were compelled to act in their own behalf. Under such circumstances, the Dolese companies were properly charged with their share of fees and costs as I had determined. *They were not involved in the personal aspects of the Dolese case but only in the protection of their corporate lives.*" (emphasis supplied)
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> Affidavit of Judge Geo. Howard Wilson, ¶ 11, App. p. 51a.

The Tenth Circuit purports to apply the "origin of the claim" test set forth in *United States* v. *Gilmore,* 372 U.S. 39 (1963), to conclude that a portion of these expenses were personal and non-deductible. App. pp. 29a-33a. In *Gilmore,* an individual business expense deduction was denied for payments of litigation costs incurred by a shareholder in obtaining a divorce. The shareholder argued that because stock of the corporations from which his income derived was part of the alleged community property, the litigation had the

effect of "conservation . . . of property held for the production of income" within the intent of section 23 (a)(2) of the Internal Revenue Code of 1939 (section 212 of the Internal Revenue Code of 1954). This Court held that the divorce action was entirely personal in origin and did not directly involve business property except as assets of the marriage. The incidental threat to Gilmore's income producing property was not sufficient to support a deduction.

However, the *Gilmore* test applies *vis a vis* the person whose expenses are being paid. Roger Dolese's pro rata share of these costs has already been conceded to be personal expense, and any attempt by Roger or the corporations to deduct that share would be subject to the *Gilmore* rule. However, the corporations' expenses arose pursuant to legal action to control and ultimately take over corporate management. Payment of these expenses by the corporations was directed by court order and was legally a corporate obligation. As to the *corporate taxpayers,* these expenses had no personal origin. Would the Tenth Circuit hold that corporate expenses incurred in defending against a take-over detrimental to the business of the corporation were personal merely because the *motivation* for the take-over attempt was animosity against a shareholder or director?

As the Tenth Circuit notes, App. p. 32a, this case is the "reverse" of *Gilmore*: a direct action against the corporations with the potential (personal) effect of increasing a divorce settlement; whereas *Gilmore* was a direct action against the taxpayer with a potential (business) effect of decreasing his income-producing assets. Since the *origin* of the costs at issue here is an action against each corporation separately, surely application of the *Gilmore* rule requires the potential personal *effect* to be disregarded (as was the potential effect on Gilmore's business assets) and each corporation's pro rata share to be treated as ordinary and necessary corporate expense. The Tenth Circuit, itself, has found:

> "Once the corporation was inhibited from the conduct of profit-making activities by fear of violating the court order the costs of obtaining clarification and relief would seem to originate in its business activities."
>
> App. p. 32a

It should be noted that that inhibiting order was entered on December 3, 1959, only two months after the nine year litigation of *Dolese* v. *Dolese, et al.* began (September 21, 1959) and only one day after the Dolese corporations were named involuntary defendants therein.

Petitioners' evidence persuaded an impartial state judge that the Dolese corporations were fighting for their corporate lives. Petitioners have produced affidavits from that judge, from the lawyers, from the accountant, all attesting to the enormous involvement of these corporations in the *Dolese* litigation. Every affidavit states that additional facts were known to the affiant which might bear upon this issue and which could be offered at trial. Surely, the granting of summary judgment in this case is in direct violation of the standards set forth by this Court in *Poller.*

A trier of fact clearly could have found that state court Judge Wilson was correct and that the corporate expenditures were proper business expenses of the corporations—a finding that would dispose of both the

first issue (corporate deduction) and the second issue (constructive dividend) in favor of the petitioners.

(b) *Advances to Roger Dolese.* The Tenth Circuit affirmed a summary judgment that accounts receivable from Roger Dolese on the corporate books represented constructive dividends although it acknowledged that this question is "normally a fact issue to be determined after trial." App. p. 35a.

> "[I]t is nevertheless well established that even a sole stockholder may make loans to and receive loans from his wholly-owned corporation that will be recognized as such for tax purposes, if he can prove that he had the requisite state of mind when the transaction took place."
>
> *Albert Ravano,* 26 TCM 793 (1967).

The "requisite state of mind" is the intention to repay. *Id.* Conversely, a dividend arises when a corporation confers benefits on a shareholder without the expectation of repayment. As discussed above, although a court must determine intent from all of the circumstances, this issue is primarily a factual one highly dependent on credibility and singularly unsuited to summary judgment.

In *Ravano, supra,* a sole shareholder kept a running account with his corporation, the initial borrowings being from the stockholder, the most recent from the corporation. There were no notes given or fixed maturity dates; interest of two and one-half and two percent, respectively, was indicated. The shareholder used the corporate borrowing in his private business affairs for a period of approximately four years prior to repayment. The Tax Court found the amounts to be bona fide loans despite the informality of the transactions,

primarily because they were in fact repaid. 26 TCM at 800.

Similarly, the running account between Roger Dolese and the Dolese Corporations began (in 1946) with borrowings by the corporations.[19] Affidavit of Roger Dolese, ¶ 9, p. 5; Rec. App. V, p. 242. Payments and disbursements were continually made on this account with cumulative payments by Roger Dolese totaling in excess of $2.2 million. As recently as 1955 a zero balance was attained. After December, 1959, until December, 1968, both Roger and the corporations were under severe financial restraint due to the pending court proceedings and court orders.[20] In fact, many of these advances were ordered to be made by the state court to cover costs assessed against Roger Dolese and over his objection. Affidavit of Roger Dolese, ¶ 10, p. 6; Rec. App. V, p. 243. Most significantly, Roger was prohibited from liquidating any of the Dolese corporations, including Dolese Bros. Co., or selling or pledging any of their stock as a source of repayment funds until the *Dolese* action terminated.

Counsel for the United States implied below that the annual, increasing renewal notes evidencing Roger's indebtedness to the corporations were a sham, designed to conceal the payment of dividends.[21] First, execu-

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[19] Roger Dolese has also continually lent his personal guarantee to corporate debt as needed.

[20] In these cases, fraud is not to be lightly presumed. *Weise,* 35 BTA 701, 704-5 (1937). Here, not only the non-declaration of the dividend amounts on Roger's tax return, but also their very payment by the corporations, would have been illegal under the state court order.

[21] Petitioner's evidence demonstrates consistent treatment of the withdrawals as loans on the corporate books, audited financial

tion of written notes was admittedly inspired by a prior IRS challenge of these loans on audit and was an effort to clarify *appearances*. The *existence* of a loan, however, is determined not by outside indicia (although these are its evidence) but by Roger Dolese's intention. Of that, there was, and is, no doubt.

Second, Roger Dolese has testified by uncontested affidavit that he intended to repay these loans with proceeds from the liquidation of Dolese Bros. Co. once the restrictions imposed by *Dolese* v. *Dolese et al.* were lifted.[22] In 1966, the first year at issue here, that action had been pending for seven years. Roger was not, therefore, unreasonable to sign a one-year note in anticipation of its termination and to renew that note annually for three years. It is undisputed that upon termination of the litigation, Roger promptly proceeded with his plans to liquidate Dolese Bros. Co. In affidavits, Roger, John M. McPherren, Esquire, and W. Bryan Arnn, CPA, have testified that this liquidation (entailing a tax cost of $1,750,000!) was effected *solely* to obtain funds to satisfy these obligations.[23] That action clearly substantiates a repayment intention within the meaning of *Ravano, supra,* and repay-

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statements (for credit reference) and tax returns (in that no divided income was claimed). Additionally, the corporations paid annual Oklahoma intangible and franchise taxes on the value of these "assets," a cost which would have been avoided if, instead, the amounts had been regarded as dividends. Affidavit of W. Bryan Arnn, Rec. App. V, pp. 288-296.

[22] Affidavit of Roger Dolese ¶ 11, pp. 6-7; Rec. App. V, pp. 243-244. John McPherren, Esq. has asserted that discussions of this plan of action began in 1966. Affidavit of John M. McPherren, ¶ 15, p. 7; Rec. App. V, p. 282.

[23] *See,* Rec. App. V, pp. 244, 282, 295.

ment itself would have followed had not the IRS intervened.

The Tenth Circuit admits that "[s]ome loan factors are present" but then apparently bases its judgment that the advances are constructive dividends as a matter of law on the following analysis:

> "Some loan factors are present. Cutting strongly the other way, however, is the size of the total advancements as compared to Roger's income and assets not tied up in the corporations. Interest alone, at the relatively nominal four percent rate of the notes, on the $1,817,133 owed March 31, 1968, exceeds $72,000 per year. Roger's gross income was approximately $125,000 per year throughout this period. His own balance sheets demonstrate an inability to liquidate the debt without sale or liquidation of one of the three corporations or borrowing from a bank, which loan in turn would have to be repaid by liquidating one of the corporations or receiving greatly increased dividends. *Had Roger borrowed this large sum in one or two lump amounts after developing a plan to sell or liquidate Dolese Bros. Co., with the specific intent to repay from the proceeds of the disposition, a true loan situation might have existed.* But the timing and the pattern of the advances in the instant case cannot be ignored." (emphasis supplied)
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> App. pp. 36a-37a.

Is the Tenth Circuit suggesting that the fact that Roger Dolese chose to liquidate Dolese Bros. Co. directly, rather than borrow interim amounts in anticipation of that liquidation,[24] is conclusive evidence

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[24] Morrison G. Tucker, who in 1967 was Executive Vice President of the Liberty National Bank and Trust Company of Oklahome City, has attested to the sufficiency of Roger Dolese's credit

that a true loan situation did not exist? Is the Tenth Circuit basing its legal conclusion on a finding that Roger Dolese was unable to repay the debt without either borrowing elsewhere or liquidating Dolese Bros. Co., in the face of clear evidence that he had investigated the first alternative and actually performed the second? Summary judgment is proper only where viewing the record in the light most favorable to the party opposing the motion "it is quite clear what the truth is." *Poller, supra,* at 467. The Tenth Circuit's speculation as to this petitioner's conduct indicates just the opposite.

The Tenth Circuit's opinion clearly recognizes that Judge Chandler confronted a significant factual disagreement on the basic intention to repay. Then from an incomplete record and despite all the evidence to the contrary, the Tenth Circuit, acting like a trier of fact, devised allegations and inferences supportive of its own conclusions—all without permitting the petitioners to present their evidence at a trial.

In concurrent examinations of Roger Dolese's personal income tax returns for the calendar years 1958-1965 and the Dolese corporations' tax returns for the fiscal years ending March 31, 1961 through March 31, 1965, revenue agents inconsistently asserted both that the corporations were liable for approximately $1,262,000 in additional tax on earnings accumulations and that Roger was liable for $890,000 in additional tax on alleged dividend income derived by recharacterizing loans from the corporations as dividends, the same claim as made here. (Recharacterization reduces the

to repay these loans. Affidavit of Morrison G. Tucker, ¶¶ 8-9, p. 3; Rec. App. V, p. 325.

corporations' earnings and thus their additional tax liability.) In a closing agreement, the IRS gave up its claim to dividend income from Roger (conceding that the withdrawals were in fact loans), and assessed only the corporation tax.[25] Affidavit of W. Bryan Arnn, ¶ 12, pp. 4-6; Rec. App. V, p. 291-293.

Now that additional corporation tax is not in question, the IRS has about-faced and is arguing that Roger's subsequent withdrawals are dividends. There is no factual or policy reason, other than the availability of revenue, which would unfavorably distinguish the withdrawals at issue here from the prior amounts. (In fact, in these later years, Roger signed notes and paid interest to the corporations, a practice not previously followed, which would make the later withdrawals the more clearly loans). Such inconsistent conduct by the Internal Revenue Service should not be routinely sanctioned by our courts.

3. The Court Below Has Created New Law Not Heretofore Recognized By Any Court Which Is In Conflict With The Opinions Of The Fifth Circuit In *United States* v. *Smith*, 418 F.2d 589 (1969) And Of The Eighth Circuit In *Ruben* v. *Commissioner*, 97 F.2d 926 (1938), And Which Would Profoundly Alter The Traditional Incidence Of Income Taxation.

Although all parties below agreed that Oklahoma Judge Geo. Howard Wilson, with authority and with-

[25] The Tenth Circuit has held that the closing agreement incorporating this settlement is a compromise agreement not admissible in evidence. App. p. 36a. However, a closing agreement is a final adjudication which (absent fraud) is conclusive against both taxpayers and the United States in any subsequent "suit, action or proceeding." Internal Revenue Code, § 7121; *Aetna Life Insurance Co.* v. *Eaton*, 43 F.2d 711(2d Cir. 1930). Compromise agreements are a distinct procedure dealt with in a separate Code Section. Internal Revenue Code, § 7122.

out collusion, charged each of the three defendant corporations with one-fourth of the costs incurred in the defense of *Dolese* v. *Dolese et al.*[28] (the remaining one-fourth being charged to Roger Dolese, personally), the court below held that the payment by each corporation of the share of such expenses for which it was thus legally obligated constituted a constructive dividend to Roger Dolese. This is directly contrary to the holding of the Fifth Circuit in *United States* v. *Smith, supra,* which held that a corporation's payment of its own legal obligation *could not* be a constructive dividend to the shareholders. The issue in *Smith* was whether or not the corporation was legally obligated in the first instance—if a legal obligation were found, there would be no constructive dividend *as a matter of law.*

> "Consequently, if the district court was correct in its determination that the corporation assumed all of the liabilities of the partnership, it was also correct in holding that the settlement payment was not a constructive dividend."
>
> 418 F.2d at 592.

Similarly, in *Ruben, supra,* the Eighth Circuit held that payment by a corporation in settlement of litigation resulting in the release of claims (including a money judgment) against a shareholder was not a constructive dividend to that shareholder, Ruben. The payment was in discharge of the corporation's own primary liability, and no specific part of the compromise

[28] "I think the [State] Court had a right to do that [impose these obligations on the corporations] and did it in good faith." Judge Chandler, Transcript I, Rec. App. IV, p. 17. *See also,* Transcript I, App. p. 11a.

payment "ever was, or could be, apportioned as an obligation of Ruben's." 97 F.2d at 928.

> "Persons who were making contested claims against him ceased and desisted from making them and released him. They were induced to do so by a payment made by a corporation which had its own interest to serve, and which gained affirmative advantages through a compromise settlement."
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> Id. at 929.

Therefore, although the settlement clearly benefited Ruben individually, the Eighth Circuit held that the fact that the corporation paid its own primary obligation from which it gained affirmative advantages precluded *any* constructive dividend to the shareholder.

The Tenth Circuit quotes from *Smith* at p. 594 to the effect that lack of *shareholder* liability for payment does not preclude a constructive dividend if that payment actually benefits the shareholder. App. pp. 34a-35a. However, the Tenth Circuit completely misinterprets *Smith* when it construes that case as support for a holding that "[t]he corporation being the legal obligee does not eliminate the constructive dividend feature." *Id.* In *Smith,* the Fifth Circuit began its analysis by assuming for purposes of argument that the corporation was precisely *not* the legal obligee, and the material cited as support by the Tenth Circuit is based on that directly contrary assumption. The Fifth Circuit said:

> *"If on remand and after a full hearing on the assumption question, the trial court finds that the corporation did indeed assume all of the liabilities of the partnership, the trial court should find for the taxpayers on the constructive dividend issue.*

> If, however, the trial court concludes that the taxpayers fail to meet their burden on the assumption issue, then the remaining points raised on this appeal by the government will have to be considered. *Consequently, we will discuss the constructive dividend question as if the corporation did not assume the contingent liability to Ritenour.* (emphasis supplied)
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> 418 F.2d at 593.

Since it is admitted here that the state court judge imposed a legally enforceable obligation on each of the defendant corporations, since it is admitted that he had the authority to do so, and since it is admitted that no fraud or collusion tainted this action,[27] there can be no constructive dividend under the decisions of the Circuit Courts in *Smith* and *Ruben*. Thus, there is a clear and direct conflict on this point of law between the Court of Appeals for the Tenth Circuit and the Courts of Appeals for the Fifth and Eighth Circuits.

Further, it is a novel and profoundly significant construction of tax law to hold that a payment imposed by law on one party can create income in a related party (who is not the recipient of the payment) when the payor has not voluntarily assumed the obligation and neither party has caused a shift in its incidence. In other words, the court below has held that where a corporate debt arises under legal compulsion *independent* of any maneuverings of either the corporation or its shareholder, payment by the lawful debtor corporation can be deemed made solely for the benefit of the shareholder. Such a holding flaunts the existence of the corporation as a separate taxpayer. In this case, the IRS has already collected almost $2 million in

[27] *See*, fn. 26, p. 31, *supra*.

capital gains tax because one of the corporations was liquidated and its property transferred to its shareholder. Now it attempts to collect income tax from that shareholder on a payment by that same corporation of its separate legal obligation. To permit discretion in the IRS to regard or disregard a separate legal entity, particularly when, as was shown above, the IRS is not restrained by mere consistency in the pursuit of revenue, is a new and dangerous precedent.

Finally, it should be noted that under the law as construed by *Smith* and *Ruben*, the finding that a corporation paid its own obligation prohibits the finding of a constructive dividend to its shareholder due to such payment, but it is not determinative of the deductibility of such payment by the corporation. Deductibility depends on whether or not the payment is an ordinary and necessary business expense as defined under Section 162 of the Internal Revenue Code. It is only to the entirely separate question of deductibility that cases such as *Gilmore, supra*, become relevant, if at all.

4. The Standard For Awarding Summary Judgment In Complex Tax Litigation And The Income Tax Characterization Of Transactions Between A Sole Shareholder And His Corporation Are Recurring Federal Questions Of Considerable Importance Which Must Be Resolved By This Court.

The enunciation by this Court of clear principles to guide the lower courts is necessary to the operation of our judicial system. The assurance that, before judgment, every litigant shall have a day in court is required by the Constitution and by our tradition of fairness. It is the duty of this Court so to exercise its power of supervision over the lower courts.

It is suggested that the proper remedy here, and the full discharge of this Court's present duty, would be to grant certiorari, summarily reverse on all issues, and remand to the District Court for a full evidentiary trial on the merits—before a different District Judge. Should the case then again get to the Tenth Circuit after a full trial, the legal errors made on an inadequate record and in a difficult context could be eliminated.

Alternatively, this Court should grant certiorari to resolve the legal conflict between the decision of the Tenth Circuit and the decisions of the Fifth and Eighth Circuits, and then remand this matter for trial on the merits.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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STATUTORY APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE (28 U.S.C.)

Rule 56.

Summary Judgment

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what ma-

terial facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall

forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

INTERNAL REVENUE CODE OF 1954 (26 U.S.C.)

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

* * *

SEC. 301. DISTRIBUTION OF PROPERTY.

(a) *In General.*—Except as otherwise provided in this chapter, a distribution of property (as defined in section 317(a)) made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in subsection (c).

(b) *Amount Distributed.*—

(1) *General rule.*—For purposes of this section, the amount of any distribution shall be—

(A) *Noncorporate distributees.*—If the shareholder is not a corporation, the amount of money received, plus the fair market value of the other property received.

* * *

(c) *Amount Taxable.*—In the case of a distribution to which subsection (a) applies—

(1) *Amount constituting dividend.*—That portion of the distribution which is a dividend (as defined in section 316) shall be included in gross income.

* * *

SEC. 316. DEFINED.

(a) *General Rule.*—For purposes of this subtitle, the term "dividend" means any distribution of property made by a corporation to its shareholders—

(1) out of its earnings and profits accumulated after February 28, 1913, or

(2) out of its earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

Except as otherwise provided in this subtitle, every distribution is made out of earnings and profits to the extent thereof, and from the most recently accumulated earnings and profits. To the extent that any distribution is, under any provision of this subchapter, treated as a distribution of property to which section 301 applies, such distribution shall be treated as a distribution of property for purposes of this subsection.

* * *

TITLE 12 OF OKLAHOMA STATUTES 1971

Sec. 231. Joinder of parties defendant.—Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.

Sec. 930. Costs in other cases—Apportionment of costs—Discretion of court.—In other actions, the court may award and tax costs, and apportion the same between the parties on the same or adverse sides as in its discretion it may think right and equitable.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. Civ-74-564-C

ROGER DOLESE and THE DOLESE COMPANY, Transferees of Dolese Bros. Co., a dissolved corporation, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*.

No. Civ-75-565-C

THE DOLESE COMPANY AND DOLESE CONCRETE COMPANY (WHOLLY OWNED SUBSIDIARY OF THE DOLESE COMPANY), *Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*.

No. Civ-74-566-C

ROGER DOLESE, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

(CONSOLIDATED CASES)

JUDGMENT

Filed in Open Court April 29, 1975

On this 29th day of April, 1975, having carefully considered the briefs of counsel as well as the statements made by counsel at pretrial and in open court on this date, and the pleadings, depositions, interrogatories and answers thereto, and the exhibits attached to defendant's Motion for Summary Judgment, the Court has concluded that there is no genuine issue as to any material fact in these actions

and that defendant, United States of America, is entitled to Judgment as a matter of law.

IT IS, THEREFORE, ADJUDGED AND DECREED that the Motion for Summary Judgment of the United States of America is sustained and Judgment is hereby entered in the above entitled actions against the plaintiffs, Roger Dolese and The Dolese Company, Transferees of Dolese Bros. Co., a dissolved corporation; The Dolese Company and Dolese Concrete Company (Wholly owned subsidiary of The Dolese Company); and Roger Dolese, and in favor of the United States of America.

/s/ STEPHEN S. CHANDLER
UNITED STATES DISTRICT JUDGE
ENTERED IN JUDGMENT DOCKET APRIL 29, 1975
By ADELAIDE HOLSTON
Deputy

TRANSCRIPT I (Rec. App. IV) pp. 13-15, 21-26, 37-42

THE COURT: Let me see what else I have asked myself here. You may be seated.

The responsibility of a matter like this is great, and I have considered this case very carefully and considering the ultimate outcome of the litigation and the Court of Appeals will be passing on it soon, and I want to and it's my duty under Rule 1, to expedite the case and get a record as small as possible that—for the Court of Appeals to consider and showing exactly my rulings. And I have come to the conclusion and that is why I needed to ask you these questions, to see if I would change my mind—I have come to the conclusion that there is not any material issue of fact here and I have come to the conclusion that these were not business expenses, but I couldn't make such a finding, and all of the evidence is right here, it's intangible, it's not anything you can add up, and it seems to me it's best for all the parties to sustain the Government's Motion for Summary Judgment and get you on your way to the Court of Appeals, so you can cheaply find out what the law is; if they send it back here to me, then I'll try it the best I know how or get you a good judge, but I think we have to find out regardless, without having reams of paper in the record and making the Court Reporter rich, find out what their feeling is about this.

When I got through, and until—I took this all home with me—I had thought from the very persuasive statements of counsel for the plaintiff and I'm aware of how skillful he is and I can say the same thing about the Government's lawyers in this case, prepared as well, but the question is right now before me without hearing any evidence, the evidence, these papers just speak for themselves, and now you can inexpensively go and find out what that Court thinks and I would welcome them sending it back, and reversing. I have no pride or feeling about that, but it's just

I've learned from sitting here 32 years, the 13th of May, that they are the ones that make the law, and my duty has just about resolved itself into, as a District Judge, a glorified trial examiner, and the thing to do is find out first from them before wasting all this time and money making a full record.

Mr. Dolese owned all of these companies in effect and his statement, as you say, would be self-serving, and I don't doubt that he acted in the ultimate good faith and certainly with advice of eminent counsel as to how the transaction should be handled from a tax standpoint.

But it is the judgment of the Court that the motion of the government, United States of America—I often say 'government'. I don't like it when the Court of Appeals says that because it's just one branch of the government, the Treasury Department—The Motion of the United States of America is sustained and judgment is entered in favor of the Government against the plaintiff, so you can be on your way.

While you look pretty grim right now, you may decide you have a better chance in the Court of Appeals, with the action posed like it is, than if you had prevailed here. You certainly have an equally good opportunity to have the law laid down as you contend, and—

MR. MOYERS: If the Court please, I would like to make a proffer of proof in this case.

* * * * * * * * * *

THE COURT: From a technical standpoint, I think you are right, but I'm an old-fashioned judge and I can't—I have to go beyond the technicalities to just what the situation is, were these personal expenses or not, for example, and every time I would get on a technicality, the facts would jump up before me and——

MR. MOYERS: How can you judge a——

THE COURT:—I had to pierce the corporate veil, and here is Mr. Dolese just same as owned all these corporate assets and as he did state liquidate one of them and convert the assets, but the technicalities, I'm just from a different era, and I would welcome the Court of Appeals to straighten it out for me and I think you have a strong case on the State Court judgment——

MR. MOYERS: Your Honor, what is——

THE COURT:—but, how am I going to say to myself these were not personal expenses.

MR. MOYERS: What is the Court of Appeals going to determine this on when it has no evidence on which to determine it on? This is what we have to argue.

THE COURT: I depended on the file here, which, and the depositions and the exhibits and the briefs, and yours is very persuasive. I had practically decided for you until last night when I was going over these papers. But, I considered everything referred to by you or the Government, but just when I got through just the plain, simple facts—I don't want to put my signature on a paper that says to the Court of Appeals that these weren't personal expenses. I'm always confronted with that very unfortunate affair, the corporations did become involved in it, and fighting for their lives, as you say, but they were his corporations, they are so—they were just Mr. Roger Dolese, and as I say, I have to subconsciously or consciously, just pierce the corporate veil, and here is—always return to the same thing—in effect, he was just the sole owner and there is only the form of the corporation here. Now, I understand for tax purposes those technicalities sometimes control, amazingly to me, sometimes in favor of the taxpayers, sometimes against them.

I'll let you go ahead. I'm sorry.

MR. MOYERS: Well, I want to ask you a question in that regard because is your Honor taking the position there is

no distinction then between Roger Dolese and the companies insofar as these questions are concerned?

THE COURT: I'm not taking that position.

MR. MOYERS: I thought you said that you appreciated——

THE COURT: I'm merely stating that one is confronted with the fact that he owned the corporations. They were his.

MR. MOYERS: Do you base your conclusion——

THE COURT: I don't know that there is anything I can do except say that is a matter of law.

MR. MOYERS: Do you base your conclusions on that?

THE COURT: I base my conclusions on the feeling I got when I really pinned myself down and got what I think is all the facts, and then the law, as I see it, and I base it on everything, and the whole thing about this case is that there are imponderables in it that are right here in the file.

MR. MOYERS: For the life of me, I can't understand how you can hold that you have all of the facts when none of the facts have been presented that are germane to the issues we are going to try.

All of the participation by the companies, which is a very vital determination of this question of whether they are ordinary or necessary expenses, none of that is in the file yet. None of the questions as to how far a loan or a dividend can be distinguished, those facts are not in the Court's—in the evidence yet at all. The only evidence that really, I think, is a total question of law is a question of the obligations. You can pay their obligations and you have just brushed off this constructive dividend question, it seems to me like, without any consideration of the fact that if they paid their own obligations it could not be a constructive dividend to Roger Dolese, except if you take the position that there is no difference between Roger Dolese and the companies. Now, if you take that position then that——

THE COURT: I'm trying to avoid passing on the question of whether they are constructive dividends.

MR. MOYERS: You have to, Your Honor, that is one of the issues.

THE COURT: That may be the result of it, result of my ruling, but I'm not trying to determine whether they are constructive dividends. It may automatically follow that I have brought that about, that situation about, but I'm, I'm merely, came to the conclusion on the two questions that you gentlemen agreed on——

MR. MOYERS: No, there are three, Your Honor.

THE COURT: Yes, three.—and it—I think you have a strong case, but I have to decide it that way because I know—it's hard for lawyers who have never sat in the hot seat and had to decide a case, and I think I understand all the facts here and it's just a feeling that you get what you must do, no matter how unpleasant, and when you know the difference between an experienced lawyer and inexperienced, intuitively you feel certain things about what the law is, what it ought to be, and I'm not here trying to say what the law ought to be. I frankly say, I don't know what it ought to be. But, under these facts as I pull them out of the files, I think these are personal expenses, and the thing, the only thing in it that bothers me, really, is the effect of that State Court judgment, and we eliminated any contention at pretrial that there was any collusion.

MR. MOYERS: That's right.

THE COURT: And the effect of that State Court Judgment, I can't rule any other way, but I'm going to quit reminiscing here and let you make your record so it will all be in here, because I want you to have a run for your money.

MR. MOYERS: Well, I'll state once more, Your Honor, that on the basis of there being no evidence of any collusion and in that respect I think the cases amply support the

fact, if that is true, a District Court judgment can determine the question of whether or not they are ordinary and necessary business expenses and if that be true, then I think we have a decision here which is not based upon all of the facts in the case.

When Your Honor says you have decided this case on the basis of the facts as you find them in the file, that is just the tip of the iceberg. That's pleadings and that sort of thing. They don't any way near touch what is going to come off in the terms of the trial of this case.

THE COURT: The facts that are disclosed here are the ones I'm deciding it on.

MR. MOYERS: But that's only half of the story, Your Honor. It isn't even half of the story.

THE COURT: I don't believe those facts can be changed, and I think, I would hope the Court of Appeals would not say there is some issue of fact, but would resolve these questions of law. But I can come to no other conclusion after going through as carefully as I did the files in the case and——

Now, don't let me talk any more. I want you to get everything in the record that might point out to the Court of Appeals something I'm overlooking.

* * * * * * * * * *

THE COURT: —the record, if the Court of Appeals is going to pass on this, knowledgeably, they ought to understand all the facts in here. I think they are all there and I have drawn the judgment and given it to the Clerk to file, and she will, or Mr. Simmons will get you photostats so you can all have copies of that right away, and he will pull them off on the 4,000 Xerox, and I dictated this just before I came into the courtrcom when I reached my decision, but I wanted to hear the answers to the questions that arose in my mind last night in going over the case, and after hearing them all, I think I understood the case then as I understand it now, and I have just signed the judgment and passed it to the Clerk, and I want to compliment counsel on preparing the case in such a manner that I think I understand it and I believe I do, and that's the only conclusion I can come to in connection with these facts that the ultimate fact always comes back to me, these expenses all arose out of personal difficulty of Mr. Dolese and the fact that while the State Court judgment was certainly effective as between the parties, I think I have to rely on Federal Law insofar as that judgment bears on the tax of the companies and Mr. Dolese, and as I construe the decisions, I can't find a loophole, but I have to admit to you that I think you made a strong case on that and other judges may look at it very differently and——

MR. MOYERS: Let me ask the question as to how we have left this matter. I believe I understood the Court to say awhile ago that if my proffer, if my offer of proof here——

THE COURT: If you have overlooked anything——

MR. MOYERS: If I've overlooked anything, I may——

THE COURT: —you may.

MR. MOYERS: All right.

THE COURT: I want the record to be full so you will have as good a position as possible in the Court of Appeals.

MR. MOYERS: Does that offer go so far as to offer our exhibits that we would show?

THE COURT: I'm trying to get you a cheap record and I think everything is in here.

MR. GRABICKI: Your Honor, may I point out that, in respect to that, that we took extensive interrogatories, as Your Honor knows, we took extensive depositions and I believe the record reflects all these things, the notes, the judgment is attached to our motion, it's all there.

THE COURT: I think it's all there.

MR. MOYERS: Well it's all that he wants, but it is not all that I——

THE COURT: I wouldn't want to clutter the record with things I don't think are relevant to a judge understanding that, the record here, and applying the law to it, and——

MR. MOYERS: Whatever else we put in, Your Honor, whatever else we put in as part of our offer of proof, which I think we will want to go to the Circuit Court for consideration, I will put it in for that purpose only.

THE COURT: I'll let you, you can make your own record.

MR. MOYERS: All right.

THE COURT: And it's before them whether I excluded—I once sat with a judge that didn't know that, excluded it as evidence, and he didn't know it was in the record if you exclude it just as if it's admitted. Then in the early days I ran onto a decision of the Supreme Court of the United States which in effect says a judge doesn't ever need to get reversed because he excluded some testimony, just let it in, and that's what I usually do, I am—but here I think that to rehash the divorce case, I think the ultimate facts the Court has to use in making this determination are just the facts that are all in here and just apply the law to them. I think you, with a small record, also, it has been my experience, the Court of Appeals takes hold of it more quickly and doesn't become confused by all the litter.

I just tried a case here and let a man put six big files in evidence, he insisted on it, and I let him do it. I think it was to his disadvantage, because they weren't relevant.

Now, insofar as—you're the lawyer—I will deny your request to put in the—put in all of the exhibits which I think in effect would duplicate the record that you already have, but they will be in the record if you want to use any of them on appeal.

MR. MOYERS: Okay.

THE COURT: Because I might be wrong and I want them to take the case and decide it on the merits——

MR. MOYERS: Okay.

THE COURT: —and if there is any issue of fact left, material fact, I don't know it, and—but I'll reopen the case if on mature consideration you decide to protect your client you need to make a record on it.

MR. MOYERS: All right. I appreciate that, because I will want to do that, I am sure.

THE COURT: All right.

MR. GRABICKI: Your Honor, if the Court please, I notice in the judgment the Court has prepared to sign you have entered judgment in favor of the Government. As the stipulation points out in pretrial we settled certain issues with the Doleses and the three companies which resulted in a substantial refund, so I suggest and would like to state for the record, what we would like to do is to go forward and process that as we would for any administrative refund and send him a check for refund and get that out of the way.

THE COURT: That's not a part of this hearing at all?

MR. GRABICKI: No, that's another issue.

THE COURT: I haven't considered those issues.

MR. GRABICKI: In other words, so it will conform to this judgment.

THE COURT: All right. I take it that the counsel for the plaintiff will be glad to get the check from the Government in the other matters.

MR. MOYERS: No, they need it worse than we do.

THE COURT: I expect that's true.

Court is in recess, subject to call.

(Hereupon, the hearing ended at 11:15 A.M.)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil No. Civ-74-564-C

ROGER DOLESE and THE DOLESE COMPANY, Transferee of DOLESE BROS. Co., *Plaintiffs*

v.

UNITED STATES OF AMERICA, *Defendant*

Civil No. Civ-74-565-C

THE DOLESE COMPANY and DOLESE CONCRETE COMPANY, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*

Civil No. Civ-74-566-C

ROGER DOLESE, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*

(Consolidated Cases)

Filed March 28, 1977

REX B. HAWKS
Clerk, U.S. District Court
/s/ By IRENE HIGGINBOTHIM
Deputy

JUDGMENT

These three consolidated cases having come on for hearing before the Court on March 8, 1977, on defendant's motion for summary judgment with respect to the two issues remaining before the Court, and the Court finding

that the pleadings, depositions, answers to interrogatories, and affidavits on file herein show that there is no genuine issue as to any material fact with respect to the remaining two issues before the Court, and that the defendant is entitled to judgment as a matter of law, and the parties having computed the amounts of refund due pursuant to their settlement of the other issues raised by plaintiffs' complaint herein, it is, in accordance therewith,

ORDERED, ADJUDGED, and DECREED that plaintiff, Roger Dolese, do have and recover of the defendant the sum of $32,091.83, consisting of $25,233.23 of assessed tax, plus $6,858.60 of assessed interest, together with statutory interest according to law; that plaintiffs, the Dolese Company and Dolese Concrete Company (wholly owned subsidiary of the Dolese Company), do have and recover of the defendant the sum of $90,528.83, consisting of $71,109.89 of assessed tax, plus $19,418.94 of assessed interest, together with statutory interest according to law; and that in all other respects, the claims raised by plaintiffs in their complaints herein are denied.

ENTERED this 25th day of March 1977.

/s/ STEPHEN S. CHANDLER
UNITED STATES DISTRICT JUDGE
ENTERED IN JUDGMENT DOCKET ON MARCH 28, 1977

TRANSCRIPT II (Rec. App. XIII) pp. 25-27

THE COURT: I know the Court of Appeals can find a fact question in nearly any case.

MR. MOYERS: If there be any doubt at all, I think the rule generally is, if there be any doubt at all about the fact that there is a dispute of material facts, this must be resolved against the mover of the summary judgment, and I think that's what should happen here.

THE COURT: Yes. I understand the law and I also understand that the Court of Appeals doesn't like a summary judgment if there can possibly be any loose factual ends, as they've told me in numerous instances. But it seems to me there's no dispositive issue of fact, and I think the Court of Appeals is going to have to decide this case, and it's interesting, we're sitting in their courtroom.

But it's the judgment of the Court that the defendant's motion for summary judgment should be and it is sustained in each of the matters. And I hope there aren't any technicalities now that will keep the matter from expeditiously being decided by the Court of Appeals, and I think, as I said before, and I think the Court quoted it in the opinion, I think that this is the way to find out what the law is and the quickest way, and I think under Rule Number 1 it's my duty, feeling as I do about only questions of law being involved, has led me to the decision to sustain the motion for summary judgment, and hopefully, the matter will this time get before that Court and they can tell me what the law is, and I'll certainly happily follow it.

If you'll prepare the proper order and present it to me——

MR. GRABICKI: Yes, Your Honor.

THE COURT: —I'll appreciate it. The sooner the better. You know it has been nearly two years since May 13th, 1975 when I gave the President my letter asking to retire

from regular active service and I think I've worked harder since that time than in the thirty-two years or so before that to get rid of these cases, and as I say, I would like to hand a lot of these in the bottom of the barrel to other judges but I feel it wouldn't be fair to do so. They're over worked. Hopefully we'll have another judge soon and maybe I won't be here when this gets back, and you'll automatically get a new judge, and all of us would like two bites at the apple, and I don't blame you for wanting it, but I believe what I have done is clearly now before the Court of Appeals, and I'll happily abide by their decision. I, of course, always similingly limit that to where they have jurisdiction, and I certainly think they have here.

It would be pleasant if I could decide all these cases for both sides, but strangely very often neither side is satisfied with the judgment. That's amazing. You'd think one or the other would be. In many cases neither side is satisfied.

If you will prepare the order.

Court's in recess subject to call.

(Hereupon, the Court adjourned at 12:15 P.M.)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 75-1520, 75-1521 and 75-1522

ROGER DOLESE and THE DOLESE COMPANY,
Transferees of Dolese Bros. Co., a dissolved corporation,
Appellants,

v.

UNITED STATES OF AMERICA, *Appellee.*

THE DOLESE COMPANY and DOLESE CONCRETE COMPANY
(wholly owned subsidiary of The Dolese Company),
Appellants.

v.

UNITED STATES OF AMERICA, *Appellee.*

ROGER DOLESE, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

(Consolidated Cases)

Appeal from the United States District Court for the Western District of Oklahoma. (D.C. 74-584-C) (D.C. 74-585-C) (D.C. 74-586-C)

Filed September 29, 1976

REX B. HAWKS
Clerk, U.S. District Court
/s/ IRENE HIGGINBOTHIM
Deputy

Donald P. Moyers and John H. Conway, Jr., for Appellants.

Murray S. Horwitz (Scott P. Crampton, Assistant Attorney General, Gilbert E. Andrews, Grant W. Wiprud, Tax Division, Department of Justice, and William R. Burkett, United States Attorney, of Counsel, on the brief), for Appellee.

Before SETH and MCWILLIAMS, Circuit Judges, and MORRIS, Chief Judge.*

MCWILLIAMS, Circuit Judge.

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* Of the United States District Court for the Eastern District of Oklahoma.

These three consolidated appeals concern summary judgment. In our view the trial court failed to follow either the mandate or the spirit of Rule 56(c), Fed.R.Civ.P. and we therefore reverse.

Roger Dolese, the Dolese Company, and the Dolese Concrete Company each instituted a separate action for the refund of federal income taxes and interest in a total amount of $1,533,755.38. The Government in due time filed an answer in each case denying that any refund was due and owing. The three cases were consolidated for trial and on January 14, 1975, the first of three pretrial conferences was held. A second pretrial conference was held on March 11, 1975, at which time the trial judge set the trial date for April 29, 1975, and at the same time set an additional pretrial conference for April 22, 1975.

On April 22, 1975, immediately preceding the third pretrial conference, the Government filed motions for summary judgment, and on that same date served copies thereof on counsel for the taxpayers. The trial court ordered the taxpayers to file within two days an answer to the Government's motion for summary judgment. The taxpayers complied with this order and on the following day filed an answer resisting the Government's motion for summary judgment. The motion for summary judgment was not set for hearing and the entire matter was thereupon further pretrialed. This pretrial culminated in an order signed by the trial judge on April 25, 1975, wherein the taxpayer listed over thirty issues of fact which remained to be resolved, with the Government listing two issues of fact which were to be resolved upon trial. This pretrial order recognized a partial settlement of issues which had been entered into between the taxpayer and the Government. And, importantly, the pretrial order of April 25, 1975, reconfirmed the trial date of April 29, 1975.

The entire matter then came on for trial on April 29, 1975. At that time counsel for both the taxpayers and the Government were present in open court, presumably ready

for trial. The taxpayers had present some seven witnesses who were prepared to give testimony. It was in this setting that the trial judge took the bench and indicated that he had determined to enter summary judgment in favor of the Government. In partial explanation thereof, the trial judge commented that "it was probably the best for all parties" that the Government's motion for summary judgment be sustained so that counsel could "get on your way to the Court of Appeals, so you can cheaply find out what the law is." Notwithstanding the judge's solicitude, counsel for the taxpayers strenuously resisted the entry of summary judgment and argued that the issues of fact referred to in the pretrial order could not be thusly resolved. Such protests failed to dissuade the trial judge from his earlier decision and he forthwith signed an order which he had previously dictated granting summary judgment for the Government. These appeals followed.

In Adams v. Campbell County School District, 483 F.2d 1351 (10th Cir. 1973), we declared as follows:

> . . . Rule 56(c), F.R.Civ.P., provides that a motion for summary judgment shall be served at least 10 days before the hearing date and before that date the adverse party may serve opposing affidavits. Noncompliance with the time provision of the rule deprives the court of authority to grant summary judgment. . . .

Applying the foregoing rule, it is at once apparent that the time provisions of Rule 56(c) were not complied with by the trial court. In the first place the rule contemplates that there be a "hearing" on a motion for summary judgment. No hearing, as such, was held in the instant case on the Government's motion for summary judgment. The rule further contemplates that such hearing should not be held sooner than ten days after the motion for summary judgment is served on opposing counsel. In the instant case no hearing was held, and the trial judge granted the summary

judgment seven days after the motion was filed with the court and served on opposing counsel. The rule also provides that the adverse party may file counter affidavits at any time before the date set for hearing. In the instant case counsel for the taxpayers was deprived of that opportunity by the failure of the trial judge to set for hearing the Government's motion for summary judgment. In this regard we note that the Government never did request that its motion be set for hearing. Since the several provisions of Rule 56(c) were not complied with by the trial judge, he had, in the words of *Adams*, no authority to grant summary judgment.

In accord with *Adams*, see our earlier opinion in Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 480 F.2d 607 (10th Cir. 1973). In that case, as in *Adams*, we held that the trial court was without authority to enter summary judgment for failure to comply with the time provisions of Rule 56(c). In *Mustang* we indicated that under "proper circumstances" the requirements of Rule 56(c) may be waived. In the instant case the Government suggests that the taxpayers waived the requirements of the Rule 56(c). We fail to find any waiver. Certainly the continuing protest made by counsel after the trial judge indicated to all concerned that he was going to grant summary judgment does not amount to waiver. In this regard the instant case is actually somewhat akin to *Mustang*. There summary judgment was entered without compliance with the time provisions of Rule 56(c), but thereafter counsel was afforded a full scale hearing on his motion for new trial. Such hearing, we held in *Mustang*, did not cure the earlier failure to follow the requirements of the rule.

In sum, then, summary judgment was entered in the instant case with complete disregard to Rule 56(c). Accordingly, we reverse and remand for further proceedings in accord with this opinion. We are not by this opinion expressing any opinion as to the merits of the controversy.

Judgment reserved and case remanded.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1511

ROGER DOLESE and THE DOLESE COMPANY,
Transferees of Dolese Bros. Co., a dissolved corporation,
Appellants,

v.

UNITED STATES OF AMERICA, *Appellee.*

No. 77-1512

THE DOLESE COMPANY and DOLESE CONCRETE COMPANY
(wholly owned subsidiary of The Dolese Company),
Appellants,

v.

UNITED STATES OF AMERICA, *Appellee.*

No. 77-1513

ROGER DOLESE, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Western District of Oklahoma
(D.C. Nos. 74-564-C, 74-565-C, 74-566-C)

Filed August 20, 1979

HOWARD K. PHILLIPS
Clerk

Donald P. Moyers and John H. Conway, Jr., Oklahoma City, Oklahoma, for Appellant.

Murray S. Horwitz, Attorney, Tax Division, Department of Justice, Washington, D.C., (M. Carr Ferguson, Assistant

Attorney General; Gilbert E. Andrews and Grant W. Wiprud, Attorneys, Tax Division, Department of Justice; and John E. Green, United States Attorney, Oklahoma City, Oklahoma, with him on the brief) for Appellee.

Before SETH, Chief Judge, BREITENSTEIN and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

These appeals arise out of suits brought by Roger Dolese, The Dolese Company, and Dolese Concrete Company, for refunds of federal income taxes and interest totaling altogether $1,533,755.38. The cases have been before this Court once previously. Dolese v. United States, 541 F.2d 853 (10th Cir. 1976). After remand the trial court entered summary judgment in favor of the United States in each case on the issues under consideration here.

The issues on appeal are whether summary judgment was properly granted 1) denying the corporations' income tax deductions for amounts paid for litigation expenses pursuant to a state court order; 2) taxing Roger Dolese (Roger) on such payments as constructive dividends from the corporations; and 3) treating advances by the corporations for payment of Roger's personal living expenses as dividends rather than loans.

Most of the facts giving rise to these suits and the rulings appealed from commenced with a separate maintenance action filed in 1959 by Roger's wife, Ardith, later changed to a suit for divorce. That action was pending more than nine years and finally terminated in 1968 with a divorce decree on Roger's cross-petition. Large sums of money were involved, much acrimony, and many charges and countercharges. Approximately $1.3 million in fees and expenses were paid by Roger and the companies in connection with the litigation.

An unusual feature of the divorce petition was that it named three corporations, The Dolese Company, Dole-

Concrete Company and Dolese Bros. Co., as party defendants in the original action. The Dolese Company was and is 100% owned by Roger Dolese, and it in turn owns 100% of the Dolese Concrete Company. (Until January 17, 1969, Ardith owned 16% of Dolese Concrete Co., and Roger and Ardith owned 4% as trustees for four children; these shares were redeemed pursuant to the divorce settlement order.) Dolese Bros. Co. was wholly owned by Roger Dolese and The Dolese Company; it was liquidated in 1970 and is now operated as a partnership between Roger and The Dolese Company.

The divorce petition accused Roger of threatening to deplete and dissipate the assets of the companies in order to deprive Ardith of her rights as wife. She sought an order restraining Roger and the corporations from any activities, "EXCEPT as will permit the defendants to conduct their business activities in a manner which is customary, usual, and ordinary in businesses of like nature." By court order entered early in the state litigation the corporations were prohibited from paying investigative expenses. By mid-1967 Roger had incurred approximately $600,000 of legal fees and legal expenses, at least $350,000 of which was spent to investigate the marital history and infidelities of his wife and the paternity of the children. On August 28, 1967, Judge Geo. Howard Wilson was assigned to take over the state court litigation. Shortly thereafter, on September 7, 1967, Ardith filed a motion to oust Roger from the management of the companies and install herself in his place, making various allegations of his incompetency based upon behavior set out in the motion. This was taken under advisement by the court and finally ruled upon, in Roger's favor, in the final settlement of the divorce proceedings on December 19, 1968. Commencing November 16, 1967, the state court issued a series of orders requiring legal fees and expenses to be paid one-fourth by each of the three corporations and Roger. The ruling was ultimately extended to all litigation expenses, including reimbursement of Roger for

the more than $600,000 he paid prior to the first such order. These orders were *sua sponte*, apparently without request from or consultation with Roger's attorneys, and were not resisted by Ardith's counsel. According to the proffered affidavit of the state court judge the rulings were based upon his conviction that this "was not just a divorce action but that it included a conspiracy to take over control of these Dolese companies," and the companies "were deeply involved and were fighting for their corporate lives."

It is the one-fourth share of the legal and other expenses of this litigation paid by each of the companies that they seek to deduct as "ordinary and necessary" under Internal Rev. Code of 1954 (IRC) § 162. The United States claims they are not deductible expenses and their payment constituted constructive dividends to Roger.

The other issue in the case concerns the practice, commenced after 1948 according to the deposition of Roger, of having The Dolese Company or the Dolese Concrete Company pay most of his personal living expenses, treating the advances as loans to Roger and accounts receivable on the corporations' books. The charges were offset by payments made by Roger from time to time. Through 1964 no interest was paid on the balances owed. Thereafter notes were given by Roger once each year, carrying 4% interest and a specified due date one year ahead. When due the interest was paid and a new note executed for the balance then owing, including new advances. The sums involved were very substantial; net advances after offsets were $187,436 in 1966, $151,761 in 1967, and $150,066 in 1968. The total balances owed to the companies were $1,817,133 as of March 31, 1968. The advances, summarized in exhibits in the record, include support money for Ardith, children's educational expenses, expenses and improvements on the home, professional fees, cars, personal taxes, insurance, travel and many miscellaneous expenses. While the evidence indicates that Roger had only about $125,000 per year gross personal income in these years the books of the corporations

show substantial credits given him from time to time against the loans. These credits allegedly totaled $2.2 million since 1949. What the sources of these repayments were is unclear in the record, although approximately $450,000 came as a result of the court order requiring the three companies to reimburse Roger for expenses incurred in the litigation. The sum of $599,900 was credited to the account one day in 1970, but withdrawn again on the same day. Apparently an interest in a rock quarry owned by Roger was transferred to a company and utilized as an offset on one other occasion. It appears to be undisputed that the net worth of Roger Dolese was at least $10 million during these years, and that he did not have sufficient assets outside the stock interests in the three companies to liquidate his debts. But he did have personal borrowing power sufficient to procure a loan from a bank to pay off the entire balance of these debts. Allegedly Dolese Bros. Co. was liquidated to provide assets with which Roger intends, when this tax litigation is finished, to liquidate his accounts payable to the companies.

The United States contends the advances treated as accounts receivable by the companies are in fact constructive dividends to Roger, and are not properly characterized as loans. At all times the corporations have had earnings and profits sufficient to support the government's position if it is legally correct.

In resolving the questions on appeal we must keep in mind that summary judgment was granted by the trial court. Therefore, we must reverse unless the government's position is unassailable on any view of the facts.

I

On the issue of deductibility to the corporations of these litigation costs as ordinary and necessary business expenses, the government relies principally upon the "origin of the claim" test set forth in United States v. Gilmore, 372 U.S. 39 (1963). It asserts that the litigation expenses were

obviously incurred in connection with the divorce of Roger and Ardith Dolese and do not arise out of the corporations' profit-seeking activities. *Gilmore* involved a divorce action in which the husband's assets were almost entirely in the stock of three essentially wholly-owned corporations, and nearly all of his income was derived from salaries and dividends paid by them. He successfully fought to retain his ownership and control. In most respects it is factually close to the instant case, except in *Gilmore* the corporate owner attempted to deduct divorce fees and expenses on his personal tax return. The Supreme Court rejected the contention that these expenses were ordinary and necessary in the conservation of property held for income, stating that the deductibility of litigaton costs depends upon whether the claim "*arises in connection with* the taxpayer's profit-seeking activities," not upon the "*consequences* that might result to a taxpayer's income-producing property from a failure to defeat the claim . . . ." 372 U.S. at 48 (emphasis in original).

In dictum the Court rejected deductibility to the business entity itself.

> Had this respondent taxpayer conducted his automobile-dealer business as a sole proprietorship, rather than in the corporate form, and claimed a deduction under § 23(a)(1), the potential impact of his wife's claims would have been no different than in the present situation. (Footnote omitted.)

372 U.S. at 49.

Appellants' position that *Gilmore* is inapplicable rests upon three points: the state court ordered payment by the corporations; Ardith and others "conspired" to take control of the business entities so that the corporations, in the words of the state judge "were fighting for their corporate lives;" and the corporations were involuntary parties to the litigation.

The first argument is disposed of easily. Such an order does not establish the deductibility of the payments.

> [T]he fact that a payment is imposed compulsorily upon a taxpayer does not in and of itself make that payment an ordinary and necessary expense within the meaning of § 162(a) of the 1954 Code.

Commissioner v. Lincoln Savings & Loan Ass'n., 403 U.S. 345, 359 (1971). *See also* Woolrich Woolen Mills v. United States, 289 F.2d 444 (3d Cir. 1961). Mere obligation to pay, whether by court order or contract, does not obviate the need to measure the expenditures against the requirements of section 162 of the Internal Revenue Code.

In order to analyze the effect of the second and third contentions it is necessary to look to the origin of the claims involving the corporations. The *Gilmore* "origin of the claim" test was reaffirmed in Woodward v. Comm'r, 397 U.S. 572 (1970). Since the wife was not seeking, nor could she receive, a property settlement or divorce from the corporations, the litigation must be divided into two parts—one being the divorce action against her husband and the attendant struggle for control of assets, and the other being the action directed against the corporations. The origin test must be applied separately to each part.

There is no doubt most of the expenditures here arose directly out of the divorce action. If a conspiracy to control the companies existed, it was only an attempt to control the Dolese assets.

An analogy might be drawn between the instant case and those involving proxy fights. Proxy fights generally originate in disputes over company policy, when each of two competing management teams seeks to convince the shareholder-owners to let their group operate the company. Proxy fight expenses paid by a corporation are deductible under IRC § 162 unless "made primarily for the benefit of individuals rather than in connection with questions of

corporate policy." Rev. Rul. 67-1, 1967-1 Cum. Bull. 28. *See also* Locke Mfg. Co. v. United States, 237 F. Supp. 80 (D. Conn. 1964).

In this appeal the record is thirteen volumes, consisting mostly of affidavits, documents and depositions offered by appellants. There is no evidence in that record of any dispute over management policy, only of thrust and counterthrust to gain advantage over the preservation or division of the Dolese property. The control claim remains, therefore, one whose origin was personal in nature.

Appellants' third argument, based upon the presence of the corporations as involuntary parties to the litigation, restrained by order from undertaking certain actions without permission of the court, presents a distinction from *Gilmore* which we believe is significant. As to the corporations *Gilmore* is presented in reverse. In *Gilmore* the suit was a divorce against the husband, with the potential effect of depleting the husband's corporate assets. Here a portion of the suit is against the corporation to compel preservation of the corporate assets, with the potential effect of increasing the wife's property settlement under the divorce.

Once the corporation was inhibited from the conduct of profit-making activities by fear of violating the court order the costs of obtaining clarification and relief would seem to originate in its business activities. Therefore, to the extent a corporation incurred legal expenses in preparing pleadings required to be filed in this litigation, in obtaining permission to settle a lawsuit previously filed against it in another state or to make an investment in a rock quarry, or the like, the origin of those claims is in the profit-making activities of the corporation and the expenses are deductible. While it is a closer case, the same is true of the motion filed on September 7, 1967, to remove Roger from management. The state judge perceived this as a request for a receiver. Arguably this, too, was a part of the battle for personal assets within the rule of Knight-Campbell Music Co. v. Comm'r, 155 F.2d 837 (10th Cir. 1946).

Cf. Tressler v. Comm'r, 228 F.2d 356 (9th Cir. 1955) (receivership litigation expenses on personal return). But the motion asserted incapacity of Roger and mismanagement, and did not simply ask for preservation of assets. The courts have allowed corporations to deduct costs of resisting actions that may be detrimental to or interfere in their business activities. *E.g.*, General Pencil Co., 3 T.C.M. (CCH) 603 (1944) (close corporation). *Cf.* Commissioner v. Heininger, 320 U.S. 467 (1943) (proprietorship).

On the other hand, the appraisals here made of the companies' assets, although paid by the corporations and useful to them in the future, obviously had their origin in the divorce case and were done to provide a valuation of the marital property. Similarly, even if evidence of the wife's infidelities helped convince the court she should not prevail in her attempted takeover of management, that information was acquired long before her motion was filed and its origin and principal usefulness was in the divorce proceedings.

Because some of the expenses paid by the corporations were obviously deductible under the above analysis, a remand is required for a determination of those amounts.

II

To the extent expenditures by the corporations were deductible expenses under our analysis above, these amounts are not dividends to Roger, of course. The mere fact expenditures were not deductible to the corporation does not make them automatically taxable to Roger. They must represent some direct benefit to him. Palo Alto Town & Country Village, Inc. v. Comm'r, 565 F.2d 1388 (9th Cir. 1977). We hold that under the undisputed facts of this case, the expenditures for litigation expenses not deductible to the corporation were constructive dividends to Roger.

Under the tax law any distribution by a corporation to its shareholders, to the extent of its earnings and profits, is a dividend, unless the distribution is within one of the exceptions of the Code. IRC §§ 316(a), 301(c)(1). None of the statutory exceptions, which treat principally stock redemptions, is applicable here. It is not necessary that the corporations intended a dividend, Crosby v. United States, 496 F.2d 1384 (5th Cir. 1974), or that the distributions be termed dividends or recorded as such.

The only fact that gave us pause was the court order requiring payment by the corporations of these items. The state trial court had power under state law to impose the payment obligations upon the corporation, but such a court cannot determine the federal income tax consequences in an action to which the United States was not a party. Commissioner v. Bosch, 387 U.S. 456 (1967). Federal law must determine the federal tax consequences of a distribution by the corporation.

While the distributions were not made directly to Roger, except for reimbursement of his payments made prior to 1968, they conferred an economic benefit upon him without expectation of repayment. *See* Wortham Machinery Co. v. United States, 521 F.2d 160, 164 (10th Cir. 1975). Despite the state court order requiring the corporations to pay, these were personal expenses of Roger for professional services and other expenses of the divorce suit. The corporation being the legal obligee does not eliminate the constructive dividend feature. In United States v. Smith, 418 F.2d 589 (5th Cir. 1969), the court in considering an analogous situation said,

> The district judge held that the Smiths received no economic benefit because the state court judgment placed no obligation of payment upon the brothers. The district judge found that the Smiths were not personally obligated to pay Ritenour because the state judgment entitled Ritenour to receive 25 per cent of

> whatever was left from the liquidation, and because Ritenour had no right to go against the Smiths individually. . . .
>
> These determinations overlook the realities present and took too narrow a view of what constitutes economic benefit. Assuming that the district court correctly determined that the Smiths were not obligated by the judgment, the Smiths directly benefitted by the corporate payment. If for example the brothers desired the settlement and if the corporation had not made the payment, either the Smiths as partners in the landholding partnership or as individuals would have had to make the payment to keep the property from being sold under the hammer. The corporation payment benefitted the Smiths because they were thereby relieved from making payment themselves.

Id. at 594.

III

The final issue is whether the "accounts receivable" of the corporations representing many individual payments of personal debts of Roger Dolese are loans or constructive dividends to him. This is normally a fact issue, to be determined after trial. B. Forman Co. v. Comm'r, 453 F.2d 1144, 1159 (2d Cir. 1972). But when there is no dispute in the evidence, it is a question of law whether the facts add up to debt or dividend. Alterman Foods, Inc. v. United States, 505 F.2d 873, 876 (5th Cir. 1974). The courts have looked to a number of test factors in deciding the question. Such factors have included the control of the corporation, its dividend history, the size of the advances, whether the corporation imposed a ceiling on the amounts that might be borrowed, whether there were definite maturity dates, attempts to force repayment, intention or attempts to repay, and the shareholder's ability to liquidate the loan. *Id.* at n.6.

Appellants argue that acceptance by the Internal Revenue Service of the accounts as loans in its 1964 tax audit establishes their status. That was a compromise agreement, however; the IRS was arguing essentially inconsistent positions, seeking both constructive dividend treatment and the unreasonable accumulation of earnings penalty under IRS § 531. The closing agreement whereby the parties accepted the unreasonable accumulations theory is not binding on later years. United States v. Int'l Bldg. Co., 345 U.S. 502 (1953). In addition, compromise agreements are not admissible in evidence. Fed. R. Evid. 408; Bratt v. Western Airlines, Inc., 169 F.2d. 214, 217 (10th Cir.), *cert. denied,* 335 U.S. 886 (1948).

In contending the advances were loans, appellants also emphasized that notes were given for the advances at issue here, interest was paid, some payments were made on the principal, and the shareholder had a balance sheet strong enough to obtain a bank loan sufficient to pay off the entire sum. Therefore, they argue that at least a fact issue exists, requiring reversal of the grant of summary judgment. We do not agree.

Some loan factors are present. Cutting strongly the other way, however, is the size of the total advancements as compared to Roger's income and assets not tied up in the corporations. Interest alone, at the relatively nominal four percent rate of the notes, on the $1,817,133 owed March 31, 1968, exceeds $72,000 per year. Roger's gross income was approximately $125,000 per year throughout this period. His own balance sheets demonstrate an inability to liquidate the debt without sale or liquidation of one of the three corporations or borrowing from a bank, which loan in turn would have to be repaid by liquidating one of the corporations or receiving greatly increased dividends. Had Roger borrowed this large sum in one or two lump amounts after developing a plan to sell or liquidate Dolese Bros. Co., with the specific intent to repay from the proceeds of

the disposition, a true loan situation might have existed. But the timing and the pattern of the advances in the instant case cannot be ignored.

Perhaps in recognition of human nature, the courts have been liberal in cases of shareholder borrowing from controlled corporations. They have tolerated channeling particular types of personal transactions through the corporation. *See* Ravano v. Comm'r, 26 T.C.M. (CCH) 793 (1967); Sharp v. Comm'r, 12 T.C.M. (CCH) 836 (1953). They have even approved payment of personal living expenses, but in significantly smaller sums and under different circumstances. Wentworth v. Comm'r, 25 T.C.M. (CCH) 869 (1966); Thistlethwaite v. Comm'r, 25 T.C.M. (CCH) 193 (1966). But whereas withdrawal of reasonable amounts are countenanced as a loan if other loan factors are present, excessive and continuous diversion of corporate funds into the controlling shareholder's pocket takes on a different character. There is a principle of too much; phrased colloquially, when a pig becomes a hog it is slaughtered.

The federal tax law recognizes the right of even a single owner to do business in the corporate form and be taxed under corporate rules. *See* United States v. Empey, 406 F.2d 157 (10th Cir. 1969). But gross abuse of the formal distinction between operating as a corporation and as a proprietorship by ignoring formalities and commingling personal and corporate funds, will require allocation of income and taxation as if there were no corporation. *See* Epperson v. United States, 74-1 U.S.T.C. ¶ 9284 (E.D. Wis. 1973), *aff'd,* 490 F.2d 98 (7th Cir. 1974); Pacific Development, Inc. v. United States, 79-1 U.S.T.C. ¶ 9138 (D.D.C. 1979).

The choice of the corporate form for doing business confers certain advantages taxwise, principally a lower maximum tax bracket on income, IRC § 11, and better fringe benefits. *See* IRC §§ 79, 101, 105, 106, 404. The choice also

carries with it certain tax disadvantages. Income taxed once to the corporation is taxed again as a dividend or capital gain when it comes out to the shareholder for his or her personal use. IRC §§ 316(a), 301, 302. This double taxation is escaped only for redemptions or liquidations after death, by operation of the step-up in basis. IRC § 1014.

If a sole owner of a corporation could have his living expenses paid by the corporation as a loan, using his control of the entity to postpone repayment indefinitely, a loophole would be created. The double taxation penalty of the corporate form might be avoided entirely by liquidation or sale after death. Why then would a controlled corporation ever pay dividends, except as required to avoid IRC § 531 penalties? We think that this type of bypass around the double tax structure is inconsistent with Congress' intent in the enactment of the income tax laws.

Wherever the line might be drawn on permissible personal loans from a corporation to its shareholders, the instant case exceeds it. We have no difficulty holding that the net advances, exceeding $150,000 in each of the years at issue here, are constructive dividends to Roger Dolese.

The judgment of the trial court is affirmed in part, reversed in part. The cause is remanded for further proceedings consistent with the views set forth herein.

SEPTEMBER TERM—OCTOBER 4, 1979

No. 77-1511

ROGER DOLESE and THE DOLESE COMPANY,
Transferees of Dolese Bros. Co., a dissolved corporation,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

No. 77-1512

THE DOLESE COMPANY and DOLESE CONCRETE COMPANY
(wholly owned subsidiary of The Dolese Company),
Plaintiffs-Appellants.

v.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

No. 77-1513

ROGER DOLESE, *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

Before Honorable Oliver Seth, Chief Judge, Honorable Jean S. Breitenstein, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Circuit Judges.

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellants.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Seth, and Circuit Judges Breitenstein and Logan, for the reasons set forth in the attached opinion on petition for rehearing.

The petition for rehearing having been denied by the panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ By Robert L. Hoecker
Howard K. Phillips, Clerk
Chief Deputy Clerk

A true copy
Teste

Howard K. Phillips, Clerk, U.S. Court of Appeals, Tenth Circuit.

/s/ By Suzanne Barrett
Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Filed October 4, 1979

No. 77-1511

Roger Dolese and The Dolese Company,
Transferees of Dolese Bros. Co., a dissolved corporation,
Appellants,

v.

United States of America, *Appellee.*

No. 77-1512

The Dolese Company and Dolese Concrete Company
(wholly-owned subsidiary of the Dolese Company),
Appellants,

v.

United States of America, *Appellee.*

No. 77-1513

Roger Dolese, *Appellant,*

v.

United States of America, *Appellee.*

Appeal from the United States District Court for the Western District of Oklahoma
(D.C. Nos. 74-564-C, 74-565-C, 74-566-C)

OPINION ON PETITION FOR REHEARING

Donald P. Moyers and John H. Conway, Jr., Oklahoma City, Oklahoma, for Appellant.

Murray S. Horwitz, Attorney, Tax Division, Department of Justice, Washington, D.C., (M. Carr Ferguson, Assistant Attorney General; Gilbert E. Andrews and Grant W.

Wiprud, Attorneys, Tax Division, Department of Justice; and John E. Green, United States Attorney, Oklahoma City, Oklahoma, with him on the brief) for Appellee.

Before SETH, Chief Judge, BREITENSTEIN and LOGAN, Circuit Judges.

PER CURIAM.

The petition for rehearing is denied. On the issue of loans versus dividends, intent to repay and expectation of repayment are significant factors not susceptible of proof by direct, objective evidence. We realize that "great circumspection is required where summary judgment is sought on an issue involving state of mind." Hahn v. Sargent, 523 F.2d 461, 468 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).

The determination of mental state in the instant case requires that inferences be drawn from the affidavits, exhibits and other documentary material found in the record. These inferences must be viewed in the light most favorable to the party against whom summary judgment was entered. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). We recognize and apply this principle. On the record presented, we conclude that no permissible inference of either an intent to repay or an expectation of repayment can be drawn. Hence, summary judgment on the loans versus dividends issue was proper.

SEPTEMBER TERM—OCTOBER 10, 1979

No. 77-1511

ROGER DOLESE and THE DOLESE COMPANY,
Transferees of Dolese Bros. Co., a dissolved corporation,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

No. 77-1512

THE DOLESE COMPANY and DOLESE CONCRETE COMPANY
(wholly-owned subsidiary of the Dolese Company),
Plaintiffs-Appellants.

v.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

No. 77-1513

ROGER DOLESE, *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellee.*

Before Honorable Oliver Seth, Chief Judge, Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges.

The Court, on its own motion and to correct a clerical error which reflects Judge Holloway as participating in the order of October 4, 1979, denying petitioners' suggestion for rehearing en banc in the captioned cases, amends that order to read as follows:

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellants.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Seth, and Circuit Judges Breitenstein and Logan, for the reasons set forth in the attached opinion on petition for rehearing.

The petition for rehearing having been denied by the panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Judge Holloway did not participate in the consideration or disposition of the suggestion for rehearing en banc.

HOWARD K. PHILLIPS, Clerk
/s/ By ROBERT L. HOECKER
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

Civil No. 74-564-C

ROGER DOLESE and THE DOLESE COMPANY,
Transferees of Dolese Bros. Co., a dissolved corporation,
Plaintiffs

v.

UNITED STATES OF AMERICA, *Defendant*

Civil No. 74-565-C

THE DOLESE COMPANY and DOLESE CONCRETE COMPANY
(WHOLLY OWNED SUBSIDIARY OF THE DOLESE COMPANY),
Plaintiffs

v.

UNITED STATES OF AMERICA, *Defendant*

Civil No. 74-566-C

ROGER DOLESE, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*

(Consolidated Cases)

AFFIDAVIT

STATE OF OKLAHOMA,
COUNTY OF GARFIELD, SS.

Geo. Howard Wilson, being first duly sworn upon oath, deposes and says:

1. I am one of the duly elected District Judges for the Fourth Judicial District of Oklahoma and reside at Enid, Oklahoma. My judicial experience began in 1952 as a Su-

perior Court Judge in Oklahoma, and I have been on the bench in Oklahoma continuously since that time.

2. I was subpoenaed by the Plaintiffs and defendant in the following cases: Roger Dolese and The Dolese Company, Transferees of Dolese Bros. Co., a dissolved corporation v. United States of America (Civil Action No. 74-564-C); The Dolese Company and Dolese Concrete Company (wholly owned subsidiary of The Dolese Company) v. United States of America (Civil Action No. 74-565-C); and Roger Dolese v. United States of America (Civil Action No. 74-566-C). These cases were filed in the United States District Court for the Western District of Oklahoma.

3. Pursuant to the aforesaid subpoenas, I was present in Judge Stephen S. Chandler's courtroom in the Federal Building, Oklahoma City, Oklahoma on April 29, 1975 and ready to testify.

4. I have personal knowledge of the matters hereinafter referred to and had I been called upon and permitted to testify my testimony of facts in these areas would be as hereinafter set forth.

5. On the 31st day of July, 1967, I was assigned by order of the Presiding Justice of the Oklahoma Supreme Court to serve as trial judge in the case of Ardith Carlene Gossi Dolese v. Roger Meroth Dolese, The Dolese Company, Dolese Concrete Company, and Dolese Bros. Co. (Case No. 102,499-D, filed in the District Court of Oklahoma County, State of Oklahoma). This assignment was given to me at the request and with the consent of all of the District Judges in Oklahoma County, Oklahoma.

6. Following my assignment as trial judge in the case referred to in paragraph 5 above and hereafter referred to as Dolese v. Dolese et al, I understook a review of the files of such case. Such review revealed the following pertinent matters. The case was originally filed as a suit for separate maintenance on September 21, 1959 by Ardith

Carlene Gossi Dolese v. Roger Meroth Dolese (Ex. 1). Thereafter, on December 2, 1959, Ardith Carlene Gossi Dolese filed an amended and supplemental petition (Ex. 2) wherein she asked for a divorce from Roger Meroth Dolese and named as parties defendant in the case the three Dolese corporations, namely, The Dolese Company, Dolese Concrete Company and Dolese Bros. Co. (which corporations employed approximately 800-1000 people). Appropriate summons were issued and served on the three Dolese corporations (Ex. 3). On December 3, 1959, an order of restraint was entered against the three Dolese corporations restraining and enjoining the said corporations from conducting their activities in any manner other than customary, usual and ordinary (Ex. 4). On December 9, 1959, the four defendants in the case of Dolese v. Dolese et al., filed a motion to modify the restraining order of December 3, 1959, so as to permit one of the defendants, The Dolese Company, to sell certain of its properties, to purchase additional equipment, and to advance funds to one of the other defendants, Dolese Concrete Company, for operating needs (Ex. 5). On December 21, 1959 an order was entered (filed on March 8, 1960) directing that an inventory and appraisement of certain property (owned by The Dolese Company) be made (Ex. 6). On December 29, 1959, Roger Dolese filed a demurrer to the amended and supplemental petition of Ardith Carlene Gossi Dolese (Ex. 8). This demurrer was overruled. On December 29, 1959, The Dolese Company, Dolese Concrete Company and Dolese Bros. Co. filed their separate demurrer to the amended and supplemental petition of Ardith Carlene Gossi Dolese (Ex. 9). Such demurrer was overruled. On January 20, 1960, Roger Dolese filed his answer to the amended and supplemental petition of Ardith Carlene Gossi Dolese and prayed that he be discharged (Ex. 10). This was denied. On January 20, 1960, The Dolese Company, Dolese Concrete Company and Dolese Bros. Co. filed their separate answers to the amended and supplemental petition of Ardith Carlene Gossi Dolese and prayed that they be dismissed as parties

defendant (Ex. 11). This was denied. On March 8, 1960 an order was entered authorizing The Dolese Company to negotiate for the sale of certain of its realty and submit any offer, acceptable to The Dolese Company, to the attorneys of Ardith Carlene Gossi Dolese and if agreed upon by them the same would be approved by the Court (Ex. 7). An offer acceptable to The Dolese Company was submitted to attorneys for Ardith Dolese who refused to agree to the offer. The property was later sold (1968) under court order at a substantially less price than was offered in 1960. On February 13, 1962, Roger Meroth Dolese, The Dolese Company and Dolese Bros. Co. filed an application for modification of the December 3, 1959 restraining order (Ex. 12) in order to permit Dolese Bros. Co. to purchase 600 shares of its stock and enter into settlement agreement of a derivative action filed in Court of Chancery, New Castle County, Delaware. On February 14, 1962 an order was entered modifying the restraining order of December 3, 1959 by authorizing Roger Dolese, The Dolese Company and Dolese Bros. Co. to enter into a settlement agreement of the aforesaid derivative action and permitting Dolese Bros. Co. to purchase 600 shares of its stock in accordance with the settlement agreement (Ex. 13).

7. One of the first pleadings that was filed following my assuming the role of trial judge in the case of Dolese v. Dolese et al, was a motion by Ardith Carlene Gossi Dolese that she be placed in charge of the management, direction and control of the three Dolese companies. This motion was filed on September 7, 1967 (Ex. 14). I regarded this as tantamount to a receivership action, and I directed the corporations to defend. On September 13, 1967, Roger Meroth Dolese and the three Dolese companies filed a response to the motion (Ex. 15). My first impression concerning the motion to change management of the companies was that there was merit in such motion. As the evidence developed as to the companies I completely changed from my first impression. However, I did not rule on this motion until the conclusion of the case. (See page 86 of Ex. 21, infra.)

8. The deposition of Ardith Carlene Gossi Dolese was taken before me on October 18, 1967 and continued for the full days of October 19, 20, 23, 24, 25, 26, 27, 28 and November 6, 7, 8 and 9. The deposition of Roger Dolese was taken before me on November 10, 15 and 16, 1967 and on January 29, 30 and 31, 1968 and February 1, 19, 20, 21, 22 and 23, 1968 and April 1, 2, 3 and 4, 1968.

9. On October 18, 1967, I entered an order for payment of temporary attorney fees (Ex. 16). The original order required Roger Dolese to pay these fees. On October 20, 1967, I entered an order for transcription fee deposit (Ex. 17). The original order required Roger Dolese to pay this fee. On November 8, 1967, I entered an order for transcription fee deposit (Ex. 18). The original order required Roger Dolese to pay this fee. On November 16, 1967, I entered an order (Ex. 19) directing that each of the four defendants (in the case of Dolese v. Dolese et al.), Roger Meroth Dolese, The Dolese Company, Dolese Concrete Company and Dolese Bros. Co. should share equally in the payment of the orders described above, that is, the orders entered on October 18, October 20 and November 8, 1967. I had the clerk present to me those orders previously entered and I personally added an "s" to the word, "Defendant" in those orders so that there would be no question of my intention to charge all such costs to all four defendants.

I came to the decision regarding the splitting of costs after having taken the deposition of Ardith Carlene Gossi Dolese and part of the deposition of Roger Meroth Dolese. This decision on my part was based on my determination that this action (Dolese v. Dolese et al.) was not just a divorce action but that it included a conspiracy to take over control of the three Dolese companies. I was of the opinion, based on the evidence presented, that the Dolese companies were deeply involved and were fighting for their corporate lives. The Dolese companies were involuntary defendants in the action, their operations had been placed

under restrictions which hampered their business, their employees had been harassed, and in my opinion their business reputation was suffering. I came to this decision to require the four defendants (in the case of Dolese v. Dolese et al.) to share equally in the payment of the costs and expenses above referred to on my own volition, without prior consultation with any party. In my opinion, the Oklahoma law (12 Okla. St. Ann. #930 and the decisions of the Oklahoma Supreme Court applicable thereto) authorized me to award and tax costs and apportion the same between the parties litigant as in my discretion I deemed right and equitable. Based on my knowledge of the facts, in my opinion the four way split of the fees and costs was right and equitable. I continued the four way split of costs and fees in all orders entered thereafter, including the final opinion and journal entry of judgment entered on December 19, 1968 (Exs. 20, 21 and 22). In keeping with this pattern for charging costs, I required a determination of all costs paid by Roger Dolese individually from the beginning of the Dolese case (see Ex. 31, p. 103) to the date of my order of November 16, 1967, and required the four defendants to share equally the amount so determined (Exs. 23, 24 and 25).

10. Because of the dual nature of the action (divorce situation on the one hand and corporate fight to avoid receivership on the other hand), I, as trial judge as had the preceding trial judges, took an active role in many phases of the operations of the Dolese companies which were under the jurisdiction of the court. Restraining orders were entered, appraisals were received, certain corporate assets ordered sold (Exs. 26-30), personnel problems investigated, acquisitions of corporate assets (such as quarry operations involving an expenditure of approximately $1,300,000.00) investigated for approval, and investigation made of financial affairs. I required preparation and presentation of exhibits revealing to me all the corporate employees, all of the officials of the corporations, their sal-

aries and duties. I required copies of tax returns, financial statements, corporate records relating to antique inventory, and lists of real estate owned by the corporations. I required the corporations to furnish me these records and they did so and they were voluminous.

11. In my judicial career I have tried over 10,000 divorce cases and the case of Dolese v. Dolese et al. is the only such case involving corporate defendants as more than nominal defendants. Here, the very existence of the Dolese companies was at stake for which they were compelled to act in their own behalf. Under such circumstances, the Dolese companies were properly charged with their share of fees and costs as I had determined. They were not involved in the personal aspects of the Dolese case but only in the protection of their corporate lives. The case was extremely involved and extended over 9 years. The actual trial before me took 57 court days. A total of 60 depositions were taken involving 77 witnesses in the United States, Canada, Virgin Islands and London, England. The depositions and case-made totaled 19,705 pages. Several hundred exhibits were introduced in evidence during the course of the trial. In all, the case produced 22 large volumes of record.

12. My testimony in the cases referred to in paragraph 2 above would generally have been in the areas as aforesaid. There are many other relevant and pertinent facts concerning the unusual involvement of the Dolese companies in the case of Dolese v. Dolese et al. which I would anticipate testifying to.

/s/ Geo. Howard Wilson
Geo. Howard Wilson

Subscribed and sworn to before me this 7th day of May, 1975.

/s/ Illegible
Notary Public

(Seal)

THE DAILY OKLAHOMAN (1/6/66)

CHANDLER REPORT: 17 COURT DAYS IN YEAR

By Katherine Hatch

During a recent 12-month period, chief U.S. District Judge Stephen S. Chandler held court in Oklahoma City a total of 17 days.

In the year preceding that, he had 20 days of court.

He accumulated a total of 58 hours and 45 minutes conducting trials and pre-trials in the year from July, 1962, through June, 1963.

These figures are the lowest of those for any of Oklahoma City's federal judges.

Work records of all the U.S. district judges in Oklahoma City were disclosed in a 26-page report entitled, "The Judicial Business of the U.S. District Court for the Western District of Oklahoma."

The report was completed in December, 1963, by Orin S. Thiel, assistant chief of the division of procedural studies and statistics, administrative office of U.S. courts, Washington, D.C.

It was compiled—with accompanying charts—after an investigation by Thiel of the Oklahoma City federal court.

Information in the report formed a basis for the December 13 order by the 10th U.S. Circuit Judicial Council which took from Chandler all judicial duties.

Source of the information back of the report and charts was the judges themselves, a spokesman said.

The Thiel report was begun before U.S. District Judge Ross Rizley suffered a stroke in October, 1963, which resulted in the lightening of his duties, but it takes that and the resulting reassignment of cases into consideration.

U.S. District Judges Luther Bohanon and Fred A. Daugherty, as roving judges, held court elsewhere in the state outside Oklahoma City during the years investigated.

This time also has been taken into account.

From his swearing in on Sept. 11, 1961, through June 30, 1962, Judge Bohanon spent 93 days away from his headquarters in Oklahoma City, most frequently holding court in Tulsa and Muskogee.

From July 1, 1962, through March, 1963, he was at headquarters 170 days and in travel status 104 days.

Judge Daugherty, from his swearing in Oct. 11, 1961, through June 20, 1962, showed 94 days of holding court outside Oklahoma City, generally in Tulsa, Muskogee and McAlester.

In the following nine months, he was in Oklahoma City 200 days and elsewhere 74 days.

Despite their absences, Judges Bohanon and Daugherty surpassed Chandler in number of trials conducted and days in the Oklahoma City court rooms.

During the year which ended June 30, 1962, Chandler had a total of 20 "calendar days of court." In Oklahoma City Rizley had 36; Bohanon had 33, and Daugherty, 22.

During the fiscal year that ended June 30, 1963, Chandler had a total of 17 days of court in Oklahoma City; Rizley had 46; Bohanon, 37, and Daugherty had 29.

In the 12 months preceding June 30, 1963, Chandler spent 10 hours on one jury trial; 31 hours and 15 minutes on a dozen non-jury trials, and 17 hours and 30 minutes in 31 pre-trial hearings.

This was a total of 58 hours and 45 minutes for the year.

Judge Rizley spent 192 hours and 30 minutes on 71 trials and pre-trials in the same period: Judge Bohanon showed

182 hours and 30 minutes on 61 trials and pre-trials in Oklahoma City for the period, and Judge Daugherty spent 136 hours and 45 minutes in 71 trials and pre-trials in Oklahoma City during the period.

The average number of trials per judge in this district for that period was 37, slightly below the national average which has been 40 for a number of years, the report noted.

Actual number of calendar days on which trials were held averaged about 50 per judge.

Although the report shows Chandler had fewer trials than the other judges, he had a majority of the special bankruptcy reorganization cases as of June 30, 1963.

At that time, 15 cases were pending, two of them dating from 1958, as Chapter X, XI or XII bankruptcy cases.

Nine of these were assigned to Chandler and two each to Rizley, Bohanon and Daugherty.

Chandler also had the greatest number of civil cases assigned to him—both before and after Judge Rizley's disability—than any of the other judges.

On Nov. 22, 1963, after reassignment of Rizley's civil cases, Chandler had a total of 222.

Judge Bohanon had 126 civil cases at that time, and Judge Daugherty had 100.

"By order of the court, for every three civil cases that are assigned to each of the two full-time district judges, one civil case is assigned to each of the two roving judges," the report said.

"This same assignment ratio is used for bankruptcy 'chapter' cases," it added.

In 1963, the median time it took a civil case from filing to disposition for 81 civil cases terminated after they reached trial stage was 17 months.

This was one month above the national median of 16 months and marked "the first time in over a decade that the median for the district has been below the national median," the report said.

During the fiscal year 1963—ending June 30, 1963—a total of 97 civil and criminal trials were held in the district—44 jury trials and 53 non-jury, the report said.